

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 28.

BENJAMIN ROSENTHAL, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COUNTY COURT OF MONROE COUNTY, STATE OF
NEW YORK.

FILED APRIL 7, 1910.

(22,089)

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vs.

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IN ERROR TO THE COUNTY COURT OF MONROE COUNTY, STATE OF
NEW YORK.

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1 STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
BENJAMIN ROSENTHAL, Appellant.

Statement Required by Rules.

The defendant was indicted by a Grand Jury of the Supreme Court, Monroe County, on the 26th day of March, 1908, for the crime of criminally receiving stolen property, in that he, being a junk dealer, purchased copper wire, belonging to a telephone company without ascertaining by diligent inquiry that the person or persons selling the wire had a legal right to do so.

Thereafter an order was duly made transferring the indictment so found in the Supreme Court to the Monroe County Court for trial. On the 7th day of May, 1908, an order was made without notice to

2 the defendant by the Monroe County Judge, resubmitting the whole matter to the Supreme Court Grand Jury. On the 23rd of May, 1908, a second indictment was found by the Supreme Court Grand Jury, which accused the defendant of criminally receiving stolen property in four counts:

First. Being a junk dealer, he bought copper wire belonging to a telephone company without ascertaining by diligent inquiry that the person selling the same had a legal right to do so.

Second. He bought the copper wire knowing it to have been stolen.

Third. He concealed the copper wire after he had purchased it, knowing that it had been stolen.

Fourth. He aided in concealing it after he had purchased it, knowing it to have been stolen.

This indictment (No. 19) was sent to the Monroe County Court for trial, by an order of the Supreme Court dated May 23, 1908. On the 11th of June, 1908, in the Monroe County Court, a motion was made and argued in which the defendant asked to have the indictment No. 19 quashed and dismissed on the ground that the Grand Jury of the Supreme Court had no right to reconsider the case under an order of the Monroe County Judge; and upon the further ground that the order of the Monroe County Judge resubmitting the same, was void because the Monroe County Judge had no power to interfere with the Supreme Court Grand Jury; and upon the further ground that the first indictment prevented the finding of a second indictment for the same crime; and upon the further ground that if any other court than the Supreme Court had jurisdiction to order a resubmission, the order of resubmission must have been made by a Court and that no Judge, as such, had any power to make such an order; and upon the further ground that an order

3 of resubmission can only be made upon a dismissal of a previous indictment. On the 18th of June, 1908, the defendant's motion to quash was denied.

On the 15th of December, 1908, the defendant pleaded guilty to the first count of the indictment, which accused him of buying telephone wire without making diligent inquiry as to the title of the seller, the defendant being a junk dealer at the time. The other three counts of the indictment were, at the time of the plea of guilty, dismissed by the Court. On the same day, the defendant made a motion in arrest of judgment and based his motion upon the ground that the Court had no jurisdiction, and that the facts stated in the count to which he pleaded guilty, did not constitute a crime, because that portion of the Statute upon which that count was based, was unconstitutional and void. The motion in arrest of judgment was denied.

On the 17th day of December, 1908, the defendant was adjudged guilty of criminally receiving stolen property, as alleged in the first count of the indictment, and the defendant was sentenced to two months' imprisonment in the Monroe County Penitentiary, and to pay a fine of two hundred fifty dollars (\$250.00) in addition, or in default of the payment of the fine that he be confined an additional thirty days.

This appeal has been taken from the judgment of conviction, from the order denying defendant's motion in arrest of judgment, and from the order denying defendant's motion to quash the indictment.

4 *Indictment Found by the Monroe County Grand Jury,
March 26, 1908.*

Supreme Court, County of Monroe.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against

BENJAMIN ROSENTHAL, Defendant.

The Grand Jury of the County of Monroe, by this indictment, accuses Benjamin Rosenthal of the crime of criminally receiving stolen property committed as follows:

The said Benjamin Rosenthal, late of the City of Rochester, in the County of Monroe, aforesaid, on the 7th day of March, in the year of our Lord, one thousand nine hundred and eight, at the city and county aforesaid, and he, the said Benjamin Rosenthal, being then and there a dealer in and collector of junk, metals and second hand materials, one hundred fifty pounds of copper wire of the value of thirty dollars; the same, then and there consisting of copper wire used by and belonging to a telephone company, to wit:—used by and being goods, chattels and personal property of the Bell Telephone Company of Buffalo, a corporation duly organized and existing under and by virtue of the laws of the State of New York, by Robert H. Mason, William Lytell, Bert Galloway, and a certain

other person or persons to the Grand Jury aforesaid unknown, then lately before feloniously stolen, taken and carried away from the said Bell Telephone Company, a corporation as aforesaid, unlawfully and unjustly and for the sake of wicked gain, and upon some consideration to the Grand Jury aforesaid unknown, did feloniously buy and receive from a person or persons whose name or names are to the Grand Jury aforesaid unknown, and cannot therefore be given without ascertaining by diligent inquiry, that the person or persons so selling and delivering the same, had a legal right to do so; against the form of the Statute in such cases made and provided and against the peace of the People of the State of New York and their dignity.

HOWARD H. WIDENER,
District Attorney of the County of Monroe.

Order Transferring Indictments from Supreme Court to Monroe County Court for Trial.

At a Trial Term of the Supreme Court held in and for the State of New York, County of Monroe, at the Court House in the City of Rochester, on the 26th day of March, 1908.

Present:

Hon. George A. Benton, one of the Justices of said Court.

Supreme Court, Monroe County.

In the Matter of Indictments.

Order granted on the 26th day of March, 1908.

On motion of Charles B. Bechtold, Esq., Ass't District Attorney of Monroe County, it is ordered that all Indictments presented to and filed in this Court on this day, be, and the same are, hereby sent to the County Court for trial and further disposal, their numbers being Sealed Indictments Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 18, 21, 23, 24, 25, 26, 30, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 53, 54; Open Indictments Nos. 1, 12, 16, 19, 20, 22, 27, 28, 29, 31, 32, 38, 48, 49, 51, 52.

(Copy.)

H. V. WOODWARD
Sp'l Dep. Cl'k.

by Robert H. Mason, William Lytell, and Bert Galloway, then lately before feloniously stolen, taken and carried away from the possession of the said Bell Telephone Company, unlawfully and unjustly, and for the sake of wicked gain, and upon some
11 consideration to the Grand Jury aforesaid unknown, did feloniously buy and receive from David Coleman and Morris Barron, without ascertaining by diligent inquiry that the said persons so selling and delivering the same, had a legal right to do so; contrary to the form of the Statute in such case made and provided and against the peace of the People of the State of New York, and their dignity.

Second Count.

And the Grand Jury of the County of Monroe, by this indictment further accuse the said Benjamin Rosenthal, of the crime of criminally receiving stolen property, committed as follows:

The said Benjamin Rosenthal, of the City and County aforesaid, on the day and in the year aforesaid, at and in the County aforesaid, the said goods, chattels and personal property mentioned, described and set forth in the First Count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein, of the goods, chattels and personal property of the Bell Telephone Company of Buffalo, a corporation as aforesaid, by Robert H. Mason, William Lytell and Bert Galloway, then lately before feloniously stolen, taken and carried away from the possession of the said Bell Telephone Company of Buffalo, a corporation as aforesaid, unlawfully and unjustly, and for the sake of wicked gain, and upon some consideration to the Grand Jury aforesaid unknown, did feloniously, knowingly and willfully buy, receive and have from David Coleman and Morris Baron, well knowing the same to have been then lately before taken, stolen and carried away from the possession of the aforesaid corporation, and that the same
12 was then and there stolen property and which property had been then and there lately before, and which he, the said Benjamin Rosenthal, then and there well knew, had lately before been feloniously taken, stolen and carried away from the possession of the said Bell Telephone Company of Buffalo; contrary to the form of the Statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

Third Count.

And the Grand Jury of the County of Monroe, by this indictment further accuse the said Benjamin Rosenthal, of the crime of criminally receiving stolen property, committed as follows:

The said Benjamin Rosenthal, of the City and County aforesaid, on the day and in the year aforesaid, at and in the City and County aforesaid, the same goods, chattels, and personal property mentioned, described and set forth in the First Count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein of the goods, chattels and personal property of the

Bell Telephone Company of Buffalo, a corporation as aforesaid, by Robert H. Mason, William Lytell and Bert Galloway, then late before feloniously stolen, taken and carried away from the possession of the said Bell Telephone Company, unlawfully and unjustly, and for the sake of wicked gain, and upon some consideration to the Grand Jury aforesaid unknown, did feloniously conceal and withhold, he, the said Benjamin Rosenthal, then and there well knowing the said goods, chattels, and personal property to have been lately before feloniously stolen, taken and carried away from the possession of the said true owner, the said corporation; contrary to the form of the Statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

13

Fourth Count.

And the Grand Jury of the County of Monroe, by this indictment further accuse the said Benjamin Rosenthal, of the crime of criminally receiving stolen property, committed as follows:

The said Benjamin Rosenthal, of the City and County aforesaid, on the day and in the year aforesaid, at and in the City and County aforesaid, the same goods, chattels, and personal property mentioned, described and set forth in the First Count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein of the goods, chattels and personal property of the Bell Telephone Company of Buffalo, a corporation as aforesaid, by Robert H. Mason, William Lytell aforesaid, by Robert H. Mason, William Lytell and Bert Galloway, then lately before feloniously stolen, taken and carried away from the said Bell Telephone Company of Buffalo, unlawfully and unjustly, and for the sake of wicked gain, and upon some consideration to the Grand Jury aforesaid unknown, did feloniously aid in concealing and withholding, he the said Benjamin Rosenthal, then and there well knowing the said goods, chattels and personal property to have been lately before feloniously stolen, taken and carried away from the possession of the said true owner; contrary to the form of the Statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

HOWARD H. WIDENER,

District Attorney of the County of Monroe.

and counsel on both sides had at two o'clock in the afternoon of June 9, 1908, at a term of the County Court, held by Hon. J. B.

M. Stephens, Monroe County Judge.

16 A motion will be made by the undersigned at a term of the County Court, appointed to be held at the Court House, in the City of Rochester, N. Y., on the 11th day of June, 1908, at 12:30 o'clock in the afternoon, or as soon thereafter as counsel can be heard for a rule or order quashing and dismissing the indictment in this action found by the Grand Jury, drawn for the said May Term, upon the following grounds:

1. That the said Grand Jury so drawn for the said May Term had no power or jurisdiction to find the said indictment.

2. That the order submitting the case to the said Grand Jury, drawn for the said May Term, was illegal and unwarranted and void, because:

(a) The County Court of Monroe County has no jurisdiction to order any submissions of such a character to a Grand Jury of the Supreme Court.

(b) The former indictment existing for the same crime prevented any other indictment being found by a mistake and separate Grand Jury for the same crime.

(c) The order of resubmission was made by the County Judge of Monroe County, as such, and any resubmission of such a character must be ordered made by a court and not by a judge.

3. The finding of previous indictment was a dismissal of any other charge against the defendant based upon the same transaction.

4. The order of reversal was made upon the theory that a motion was to be made to dismiss the first indictment, and no motion having been made and no dismissal having occurred, the indictment and the order were unauthorized and void.

17 5. Under the Penal Code, a resubmission could only have been ordered after a dismissal of the previous indictment.

Respectfully yours,

WILE & OVIATT,

Attorneys for Defendant.

928 Granite Bldg., Rochester, N. Y.

To Howard H. Widener, District Attorney of Monroe County.

Affidavit in Support of Motion to Quash Second Indictment.

County Court, Monroe County.

PEOPLE OF THE STATE OF NEW YORK

against

BENJAMIN ROSENTHAL.

STATE OF NEW YORK,

County of Monroe, City of Rochester, ss:

Merle Lewis Sheffer, being duly sworn, deposes and says:

I am managing clerk in the office of Wile & Oviatt, the attorneys for the above named defendant.

An indictment was found against the above named defendant for receiving stolen property on the 4th day of March, 1908. No motion to quash or to otherwise dispose of the said indictment, or to dismiss the same was ever made, and the same is still in full force and effect. This is referred to in the annexed notice of motion as the indictment found at the March Term. While this indictment was in full force, the indictment mentioned in the annexed notice as the one found at the May Term was filed, based upon the same facts or transaction and accusing the defendant of the same crime. This second indictment was found in pursuance to an order made by Hon. J. B. M. Stephens, Monroe County Judge, which said order was a Judge's order and not a Court order, and which directed the resubmission of the same to a Grand Jury of the Supreme Court. The order was based upon the theory that a motion was made to quash the first indictment, which was never done.

MERLE LEWIS SHEFFER.

Subscribed and sworn to before me this 11th day of June, 1908.

J. H. GILMORE,

Spl. Dep. Clk.

Opinion on Motion to Quash.

County Court, Monroe County.

THE PEOPLE OF THE STATE OF NEW YORK

VS.

BENJAMIN ROSENTHAL.

Motion on behalf of defendant to dismiss an indictment found against him by the May Grand Jury of the County of Monroe, upon the ground among others, that the indictment for the same offense had been found by the March Grand Jury of said county, which was undisposed of at the time the second indictment was found.

Percival D. Oviatt for the motion.

F. F. Zimmerman for the People.

An indictment was filed against the defendant March 25, 1908, charging him in a single count with the crime of criminally receiving stolen property by the purchasing from persons therein named certain wire belonging to the Bell Telephone Company, "without ascertaining by diligent inquiry, that the person or persons so selling and delivering the same had a legal right to do so," the said defendant being a dealer in old metal at the time of such purchase.

The defendant was permitted, upon a motion made for that purpose, to inspect the minutes of the Grand Jury and the People, anticipating a motion to dismiss the indictment upon the ground of insufficient evidence, presented and procured to be signed by the County Judge, an order directing the case to be resubmitted to the next Grand Jury. The case was resubmitted and an indictment filed on May 23, 1908, charging the defendant with the crime of crimi-

nally receiving stolen property in four several counts, the first one charging the crime to have been committed in the same manner as it was charged in the former indictment.

It is now urged that the order signed by the County Judge has no validity and that the case was presented without authority for re-investigation by the Grand Jury that found the second indictment.

20 It may be conceded, I think, that the order directing the submission was improvidently made and furnished no warrant for a re-investigation of the charge against the defendant, and the procedure by which the second indictment was found and the authority by which it must be sustained, if at all, must rest upon the provisions of Sec. 42, Art. 2, Title 4, Chap. 2, Part IV, of the Revised Statutes. Said Sec. 42 was expressly excepted from repeal by Chap. 593, L. 1886; it provides, "If there be at any time pending against the same defendant, two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be superceded by such second indictment, and shall be quashed."

The order having been improperly granted, it may, I think, be considered as having no effect; it neither aids nor prejudices the operation of the statute above quoted. In *Peo. v. Bissert*, 71 App. Div. 118, a second indictment was found while a demurrer was pending and undetermined to a prior indictment. Two Justices of the Appellate Division of the First Department held the second indictment to be bad and three justices were of the opinion that it was valid; the judgment of conviction, however, was reversed, there being another question in the case upon which three of the justices concurred. The judgment of reversal was affirmed by the Court of Appeals without opinion, and its determination is indecisive upon the question under scrutiny; the weight of authority, however, seems to be in favor of sustaining the second of two indictments found for the same offense.

The motion to dismiss the indictment is denied.

Dated June 18, 1908.

21 *Order Denying Motion to Quash Indictment Found May 23, 1908.*

At a Regular Term of the Monroe County Court, held in and for the County of Monroe, at the Court House, in the City of Rochester, N. Y., on the 18th day of June, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against

BENJAMIN ROSENTHAL, Defendant.

The above named defendant having moved to quash and dismiss the indictment in this action, known as No. 19, and filed May 23rd,

1908, and upon reading and filing the notice of motion and the affidavit of Merle Lewis Sheffer, sworn to the 11th day of June, 1908, and after hearing Percival DeWitt Oviatt, in support of said motion, and F. F. Zimmerman, Assistant District Attorney of Monroe County, in opposition thereto, and due deliberation having been had, and the Court having made and filed its decision denying said motion it is, upon motion of Howard H. Widener, District Attorney of Monroe County,

22 Ordered that the motion made herein by the defendant to quash and dismiss the indictment herein, known as No. 19 and filed May 23, 1908, be, and the same is hereby, in all things, denied.

JAMES L. HOTCHKISS, *Clerk.*

Enter.

J. B. M. S.

Order Denying Motion in Arrest of Judgment.

At a Regular Term of the Monroe County Court, held in and for the County of Monroe, at the Court House, in the City of Rochester, N. Y., on the 15th day of December, 1908.

Present:

Hon. John B. M. Stephens, Monroe County Judge.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

VS.

BENJAMIN ROSENTHAL, Defendant.

The above named defendant having pleaded guilty to the first count of an indictment found in this action by the Grand Jury of the County of Monroe, on the 23rd day of May, 1908, and having made a motion in arrest of judgment herein upon the ground that this Court has no jurisdiction over the subject matter of the

23 said first count of said indictment, and upon the further grounds that the facts stated in said count do not constitute a crime; and after hearing Percival De Witt Oviatt, of counsel for the defendant in this action, in support of said motion, and F. F. Zimmerman, of counsel for the plaintiff herein, in opposition thereto, and due deliberation having been had, it is, upon motion of Howard H. Widener, District Attorney of the County of Monroe,

Ordered that said motion in arrest of judgment herein, be and the same is hereby denied.

JAMES L. HOTCHKISS, *Clerk.*

Clerk's Minutes.

At a Regular Term of the Monroe County Court, held at the Court House, in the City of Rochester, County of Monroe, and State of New York, on the 26th day of May, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

Indictment No. 19, filed May 26, 1908.

24 Percival De Witt Oviatt, Attorney for Defendant.

The Defendant appeared in Court and was admitted to bail in the sum of five hundred dollars (\$500.00).

Court adjourned from time to time until June 5, 1908, at 10 o'clock A. M.

JUNE 5, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

Court convened pursuant to adjournment.

Defendant appeared in Court for arraignment.

Mr. Oviatt announced that he desired to make a motion to quash and dismiss the indictment.

The arraignment was postponed.

Court adjourned from time to time until June 11, 1908, at 10 A. M.

JUNE 11, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

25 PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

Court convened pursuant to adjournment.

Mr. Oviatt made a motion to quash and dismiss the indictment. Arguments were heard and decision reserved.

Court adjourned from time to time until June 18th, 1908, at 10 o'clock, A. M.

JUNE 18, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

Court convened pursuant to adjournment.

The defendant's motion to quash and dismiss the indictment is denied.

Court adjourned from time to time until November 19th, 1908, at 10 o'clock in the morning.

26

NOVEMBER 19, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

The Court met pursuant to adjournment.

Defendant appeared in Court in person and by counsel, Mr. Oviatt, and was arraigned, and pleaded not guilty.

The date of trial was fixed for December 15th, 1908.

Court adjourned from time to time until December 15th, 1908, at ten o'clock in the morning.

DECEMBER 15, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

Court met pursuant to adjournment.

27 Defendant appeared in Court in person and by counsel, Mr. Oviatt, and withdrew his plea of not guilty to the indictment, and pleaded guilty to the first count of the indictment.

Upon motion of F. F. Zimmerman, Assistant District Attorney of Monroe County, the Court

Ordered the second, third and fourth counts of the indictment dismissed.

December 17, 1908, was the date set for judgment and sentence.

Mr. Oviatt then moved in arrest of judgment in this case and for the discharge of the defendant, upon the grounds:

First. That this Court has no jurisdiction over the subject matter

of the count in the indictment, to which the defendant has pleaded guilty.

Second. Upon the ground that the facts stated in that count of the indictment do not constitute a crime.

This motion and the grounds upon which it is based, are founded upon the defendant's contention that that portion of the Statute under which this point has been framed, is unconstitutional in that it violates the Fourteenth Amendment of the Constitution of the United States, and abridges the privileges and immunities of the defendant, and deprives him of liberty and property without process of law, and denies to him the equal protection of the laws; and in that it violates Article I, Section 1, of the Constitution of the State of New York, and deprives this defendant of the rights and privileges secured to other citizens thereof; and in that it violates Article I, Section 6, of the Constitution of the State of New York, and deprives the defendant of liberty and property without due process of law.

Motion denied and defendant *accepts* to the ruling.

28 Court adjourned from time to time until December 17th, 1908, at ten o'clock in the morning.

DECEMBER 17, 1908.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

The Court met pursuant to adjournment.

Defendant appeared in person and represented by Mr. Oviatt, his counsel.

F. F. Zimmerman, Assistant District Attorney, moved to sentence the defendant, and the Clerk asked defendant if he had any legal cause to show why the sentence of the Court should not be announced.

Mr. Oviatt again renewed his motion in arrest of judgment, which was again denied.

Exception taken by the defendant.

The Court sentenced the defendant to be imprisoned in the Monroe County Penitentiary for two months, and in addition thereto, that he pay a fine of two hundred fifty dollars (\$250.00), or in default thereof, that he be committed to said Penitentiary for thirty days additional.

(Copy.)

JOHN A. GILMORE,
Special Dep'y Clerk,
Monroe County, N. Y.

29

Record of Conviction.

Monroe County Court.

Present:

Hon. John B. M. Stephens, County Judge of Monroe County.

THE PEOPLE

VS.

BEN. ROSENTHAL.

Indictment No. 19, filed May 23, 1908.

The defendant having been indicted for the crime of criminally receiving stolen property on the 23rd day of May, 1908, committed as follows:

First Count. On March 3rd, 1908, at the City of Rochester in this County, being then and there a dealer and collector of metals and second hand material, 180 pounds of copper wire of the value of \$26.64, the same then and there consisted of copper wire used by and belonging to a telephone company, to wit:—used by and being the goods, chattels and personal property of the Bell Telephone Company of Buffalo, a corporation duly organized and existing under and by virtue of the laws of the State of New York, by Robert H. Mason, William Lytell and Bert Galloway, then lately before feloniously stolen, taken and carried away from the possession of the said Bell Telephone Company, unlawfully, unjustly, and for the sake of wicked gain, and upon some consideration to

30 the Grand Jury unknown did feloniously buy and receive from David Coleman and Morris Barron without ascertaining by diligent inquiry that the said persons so selling and delivering the same had a legal right to do so, contrary to the form of the Statute in such cases made and provided, and against the peace of the People of the State of New York and their dignity.

The defendant having been brought into Court for arraignment on the 19th day of November, 1908, was asked if he desired the aid of counsel, to which he answered, "I have Mr. Oviatt, Esq.," and the said defendant was thereupon arraigned upon the indictment, to which he pleads that he is not guilty, whereupon the Court appoints the 15th day of December, 1908, for trial. On said day defendant pleaded guilty to criminally receiving stolen property as charged in the first count of the Indictment, whereupon the Court appoints the 17th day of December, 1908, for pronouncing judgment.

And on said last mentioned day the defendant appeared for judgment and was asked by the Clerk whether he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause appearing why judgment should not be pronounced.

It is ordered and adjudged by the Court that the said Ben. Rosenthal for the crime of criminally receiving stolen property as charged

in the first count of the Indictment No. 19, aforesaid, whereof he has been convicted, be imprisoned in the Monroe County Penitentiary for the term of two months and in addition thereto that he pay a fine of \$250, and in default thereof that he stand committed to said Penitentiary for 30 additional days, he being sentenced this 17th day of December, 1908.

The above named defendant was examined by the Court before judgment was pronounced, and he stated that he was born in Russia; resides in Rochester. Age, 33 years. Married. Parents living. Occupation junk peddler. Education, common school. Had religious instruction. Habits temperate. Never before convicted.

(Copy.)

JOHN H. GILMORE,
Special Dep. Clerk.

Notice of Appeal.

County Court, Monroe County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

You will please take notice, that the above named defendant hereby appeals to the Supreme Court, Appellate Division, Fourth Department, from the judgment of conviction herein and from the sentence of imprisonment herein, for the crime of criminally receiving stolen property, rendered against him by the County Court of Monroe County, held at Rochester, N. Y., in and for the County of Monroe, on the 17th day of December, 1908, and likewise from an order denying defendant's motion in arrest of judgment made by said Court on the 15th day of December, 1908.

And likewise from an order made by said Court in this action, and entered in the office of the Clerk of the County of Monroe, on the 7th day of May, 1908.

Respectfully yours,

WILE & OVIATT,
Attorneys for Defendant,
928 Granite Bldg., Rochester, N. Y.

To Howard H. Widener, District Attorney of the County of Monroe and to the County Clerk of the County of Monroe.

Order Amending Notice of Appeal.

At a Regular Term of the Monroe County Court, Held in and for the County of Monroe, at the Court House, in the City of Rochester, N. Y., on the 28th Day of December, 1908.

Present:

Hon. John B. M. Stephens, Monroe County Judge.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

33 Upon reading and filing the judgment roll in this action, and the notice of appeal filed and served by the above named defendant herein, and it appearing from oral statements made by counsel in open court, and also from an inspection of the documents themselves, that the notice of appeal herein was filed and served previous to the entry of the order herein, dated June 18, 1908, and upon motion of Wile & Oviatt, attorneys for the above named defendant, and after hearing the District Attorney of Monroe County, who appears upon this motion by F. F. Zimmerman, it is

Ordered that the notice of appeal herein be, and the same is hereby, amended to read as follows:

"County Court, Monroe County.

"PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

"You will please take notice, that the above named defendant
"hereby appeals to the Supreme Court, Appellate Division, Fourth
"Department, from the judgment of conviction herein and from
"the sentence of imprisonment herein, for the crime of criminally
"receiving stolen property, rendered against him by the County
"Court of Monroe County, held at Rochester, N. Y., in and for the
"County of Monroe, on the 17th day of December, 1908, and like-
"wise from an order denying defendant's motion in arrest of judg-
"ment made by said Court on the 15th day of December, 1908,
"and from an order made by the Monroe County Judge in
34 "this action resubmitting the case to the Grand Jury and
"dated May 7th, 1908, and from an order herein made by
"the Monroe County Court, denying defendant's motion to quash
"and dismiss the indictment bearing date the 18th day of June,

"1908, and from each and every of said judgments, sentence and
"orders, and from the whole thereof.

"Respectfully yours,

"WILE & OVIATT,
"Attorneys for Defendant, 928 Granite
Bldg., Rochester, N. Y.

"To Howard H. Widener, District Attorney of the County of
"Monroe and to The County Clerk of the County of Monroe.

JAMES L. HOTCHKISS, Clerk.

Enter.

J. B. M. S.

35 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, Fourth Department.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against
BENJAMIN ROSENTHAL, Defendant.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Percival De Witt Oviatt, being duly sworn, deposes and says:

That he is one of the attorneys for the defendant in the above
entitled action.

That no opinion was written or handed down by the Court be-
low, except on the motion to quash, which is printed herein.

PERCIVAL DE WITT OVIATT.

Subscribed and sworn to before me this 22nd day of December,
1908.

MERLE LEWIS SHEFFER,
Commissioner of Deeds.

36 *Order Filing Record in Appellate Division.*

Supreme Court, Appellate Division, Fourth Department.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
BENJAMIN ROSENTHAL, Appellant.

Pursuant to Section 1353 of the Code of Civil Procedure, it is
Ordered, that the foregoing printed record be filed in the office
of the Clerk of the Appellate Division of the Supreme Court, Fourth
Department.

Dated January —, 1909.

J. B. M. STEPHENS,
Monroe County Judge.

Stipulation Waiving Certification.

Supreme Court, Appellate Division, Fourth Department.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
BENJAMIN ROSENTHAL, Appellant.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and accurate copies of the indictment found March 26th, 1908; the order transferring indictment from Supreme Court to Monroe County Court, dated March 26th, 1908; the order of resubmission; the indictment dated May 23rd, 1908; the order transferring indictment of Supreme Court to Monroe County Court, dated May 23rd, 1908; the notice of motion to quash indictment; the opinion dated June 18th, 1908; the order denying motion to quash, entered December 23rd, 1908; the order denying motion in arrest of judgment; the Clerk's minutes; the record of conviction; the notice of appeal; and the order amending the notice of appeal now on file in the Clerk's office of the County of Monroe and certification thereby by the Clerk of said County pursuant to Section 1353, is hereby waived.

Dated January —, 1908.

HOWARD H. WIDENER,
District Attorney, for Plaintiff-Respondent.
WILE & OVIATT,
Attorneys for Defendant-Appellant.

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, New York, commencing on the 6th day of July, 1909.

Present:

Honorable Peter B. McLennan, Presiding Justice.
Honorable Alfred Spring,
Honorable Pardon C. Williams,
Honorable Frederick W. Kruse,
Honorable James A. Robson,
Associate Justices.

PEOPLE OF THE STATE OF NEW YORK, Respondent.
against
BENJAMIN ROSENTHAL, Appellant.

The above named Benjamin Rosenthal, defendant in this action, having appealed to the Appellate Division of the Supreme Court,

Fourth Department, from a judgment of conviction of the County Court of the County of Monroe, rendered on the 17th day of December, 1908, and from an order denying defendant's motion in arrest of judgment, made by said County Court on the 15th day of December, 1908, and from an order made by the Monroe County Judge in this action resubmitting the case to the Grand Jury, and dated May 7th, 1908, and from an order made herein by the said Court denying defendant's motion to quash and dismiss the indictment bearing date June 18th, 1908, and the said appeal having been argued by Mr. P. D. Oviatt, of counsel for the appellant, and by F. F. Zimmerman, Assistant District Attorney of Monroe County, of counsel for the respondent, and due deliberation having been had thereon.

It is hereby Ordered that the judgment and the orders so appealed from be and the same hereby are affirmed.

All concur.

[SEAL.]

NEWELL C. FULTON, *Clerk*.

Entered 6th day of July, 1909.

Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court, in the Fourth Judicial Department, do hereby certify that the within order is a true copy of the original now on file in this office and of the whole thereof, and that the original case and papers upon which said appeal was heard are hereunto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said court, at the City of Rochester, N. Y., this 6th day of July, 1909.

NEWELL C. FULTON, *Clerk*.

Judgment of Affirmance.

At a Term of the County Court, held at the Court House in the City of Rochester, New York, in and for the County of Monroe, on the 5th day of August, 1909.

Present:

Hon. J. B. M. Stephens, Monroe County Judge.

County Court, County of Monroe.

THE PEOPLE OF THE STATE OF NEW YORK
against
BENJAMIN ROSENTHAL.

The above entitled action having been commenced by the presentation of a true Bill of Indictment on the 23rd day of May,

1908, by a Grand Jury of the County of Monroe, charging
41 the said defendant with the commission of the crime of crim-
inally receiving stolen property, and, the defendant having
thereafter and on or about the 15th day of December, 1908, pleaded
guilty to the first count of said indictment, and the said plea of
guilty having been accepted by the District Attorney, and there-
after and on the 17th day of December, 1908, at a regular term of
the County Court of the County of Monroe, the defendant having
been sentenced by Hon. J. B. M. Stephens, County Judge, to be
imprisoned in the Monroe County Penitentiary for a period of two
months, and in addition thereto to pay a fine of Two Hundred and
Fifty Dollars, and in default of the payment of said fine to be im-
prisoned in said penitentiary for a term of thirty days, said term
to begin at the expiration of the service of the aforesaid two months;
and thereafter the said defendant having appealed to the Appellate
Division of the Supreme Court, Fourth Judicial Department, and
said appeal having been duly argued before the Appellate Division,
and the said Appellate Court having thereafter and on the 6th day of
July, 1909, handed down its remittitur affirming the said judgment
of conviction, and the said Order of the Monroe County Judge
denying defendant's motion in arrest of judgment made by said
County Court on the 15th day of December, 1908, and the order
made by the Monroe County Judge re-submitting the case to the
Grand Jury, dated May 7th, 1908, and the order made by the Mon-
roe County Court denying defendant's motion to quash and dismiss
the indictment, and, said remittitur having been duly filed in the
County Clerk's Office of Monroe County on the 8th day of April,
1909.

42 Now, Therefore, on motion of F. F. Zimmerman, Assist-
ant District Attorney, it is hereby,

Ordered and Adjudged, that the said defendant be imprisoned
in the Monroe County Penitentiary for a period of two months,
and that in addition thereto he pay a fine of Two Hundred and
Fifty Dollars, and that in default of the payment of said fine he
be imprisoned for an additional thirty days to commence at the
expiration of the aforesaid two months, in the Monroe County Pen-
itentiary. And, it is further,

Ordered and Adjudged, that the Sheriff of the County of Mon-
roe is hereby commanded to arrest the said Benjamin Rosenthal,
and forthwith convey him to the Monroe County Penitentiary, and
deliver him into the custody of the Superintendent of said institu-
tion, to be by said Superintendent imprisoned and detained in said
institution as hereinbefore provided, and this shall be the warrant
and authority of the said Sheriff and Superintendent for so doing.

JAMES L. HOTCHKISS,

County Clerk, Monroe County.

Enter.

J. B. M. S.

43 *Notice of Appeal to Court of Appeals.*

County Court, Monroe County.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against —
BENJAMIN ROSENTHAL, Appellant.

You Will Please Take Notice, that the above named appellant hereby appeals to the Court of Appeals from a judgment of the Supreme Court, Appellate Division, Fourth Department, entered in the office of the Clerk of the County of Monroe, on the 5th day of August, 1909, which said judgment affirms the judgment of conviction herein and the sentence of imprisonment herein for the crime of criminally receiving stolen property, rendered against him by the County Court of Monroe County, held at Rochester, N. Y., in and for the County of Monroe, on the 17th day of December, 1908, and which said judgment further affirms an order denying defendant's motion in arrest of judgment made by said court on the 15th day of December, 1908; also an order made by the Monroe County Judge in this action, re-submitting the case to the Grand Jury, and dated May 7th, 1908; and also an order herein made by the Monroe County Judge denying defendant's motion to quash and
44 dismiss the indictment, bearing date the 18th day of June, 1908; and said defendant appeals from each and every of said judgments, sentence and orders, and from the whole thereof.
Respectfully yours,

WILE & OVIATT,
Attorneys for Appellant.
928 Granite Building, Rochester, N. Y.

To Howard H. Widener, District Attorney of the County of Monroe, and James L. Hotchkiss, Clerk of the County of Monroe.

Stipulation Waiving Certification.

County Court, Monroe County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent,
against
BENJAMIN ROSENTHAL, Defendant-Appellant.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of a true copy
45 of the Judgment Roll, filed upon the entry of the order and Judgment herein of the Appellate Division—Fourth Department, and of the Notice of Appeal to the Court of Appeals the origi-

nals of which are now on file in the office of the Clerk of the County of Monroe.

Dated September 9th, 1909.

WILE & OVIATT,
Attorneys for Defendant-Appellant,
928 Granite Bldg., Rochester, N. Y.
HOWARD H. WIDENER,
District Attorney for Monroe County.
Attorney for Plaintiff-Respondent,
Court House, Rochester, N. Y.

Affidavit of No Opinion.

County Court, Monroe County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent,
against
BENJAMIN ROSENTHAL, Defendant-Appellant.

46 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Percival DeWitt Oviatt, being duly sworn deposes and says:

That he is one of the attorneys for the defendant-appellant in the above entitled action, and that no Opinion herein was given by the Supreme Court—Appellate Division—Fourth Department.

P. DEW. OVIATT.

Subscribed and sworn to before me this 2nd day of September, 1909.

MERLE LEWIS SHEFFER,
Com'r of Deeds.

47 Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 8th day of February, in the Year of Our Lord One Thousand and Ten, Before the Judges of said Court.

Witness, The Hon. Edgar M. Cullen, Chief Judge, presiding. R. M. Barber, Clerk.

Remittitur. February 9th, 1910.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
ag'st
BENJAMIN ROSENTHAL, Appellant.

Be it Remembered, That on the 18th day of September, in the year of our Lord one thousand nine hundred and nine, Benjamin

Rosenthal, the appellant in this action, came here into the Court of Appeals, by Wile and Oviatt, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division, Fourth Department, affirming a judgment of conviction of the County Court of Monroe County. And
 48 the People of the State of New York, the respondent in said action, afterwards appeared in said Court of Appeals by Howard H. Widener, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Percival DeWitt Oviatt of counsel for the appellant, and by Mr. Freeman F. Zimmerman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of Monroe County appealed from in this action, be and is hereby in all things affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the County Court of Monroe County before the Judge thereof, according to the form of the statute in such case made and provided.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

49

COURT OF APPEALS, CLERK'S OFFICE,
 ALBANY, February 9th, 1910.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

50

County Court, Monroe County.

At a Term of the County Court of the County of Monroe, N. Y.,
Held at the County Court House, in the City of Rochester, N. Y.,
on the 21st Day of February, 1910.

Hon. J. B. M. Stephens, Presiding.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
BENJAMIN ROSENTHAL.

It appearing from the records of this Court and the remittitur of the Court of Appeals now on file in the office of the clerk of this Court that the above named defendant was duly indicted by a Grand Jury of the Supreme Court, impaneled in and for the County of Monroe on the 23rd day of May, 1908, of a felony, Criminally Receiving Stolen Property and that on said date it was by order of said Supreme Court duly sent to this Court for trial and further disposal, and that thereafter and on the 15th day of December, 1908, defendant came into this Court with his attorney and counsel, Percival D. Oviatt, Esq., withdrew his former plea of not guilty and plead guilty to the first count of said indictment, and that on the 17th day of December, 1908, this Court duly pronounced sentence upon his said plea of guilty, that he be imprisoned
51 in the Monroe County Penitentiary for two months, and in addition thereto, that he pay a fine of two hundred fifty dollars (\$250.00), or in default thereof, that he be committed to said Penitentiary for thirty days additional.

And it further appearing from the records of this Court and the said remittitur and the remittitur of the Appellate Division, Fourth Judicial Department now on file in the office of the Clerk of this Court, that the defendant thereafter appealed from the Judgment of Conviction of this Court and the sentence pronounced thereon, and that the said judgment was duly affirmed by said Appellate Division of the Supreme Court and its remittitur upon said appeal filed in this Court, remanding the said cause back to this Court and directing this Court to carry into effect and execution said judgment of conviction and sentence, and that in pursuance thereof this Court did on the 5th day of August, 1909, make and enter a judgment of affirmance upon said remittitur ordering the execution of said judgment and sentence, and thereafter the said defendant did appeal to the Court of Appeals of this State from the said judgment of affirmance and did bring up for review before said Court of Appeals certain orders made in the course of said cause, and said appeal having been duly argued before said appellate court the Court of Appeals did on the 8th day of February, 1910, by its decision affirm the said judgment of conviction and cause to be made and signed its remittitur remanding this cause to this Court to carry into effect and execution

52 the judgment of conviction and sentence, and it further appearing that the defendant has at all times been at large upon bail and that no part of said sentence has ever been executed;

Now, therefore, on motion of Freeman Fithian Zimmerman, Assistant District Attorney of the County of Monroe, it is hereby

Ordered and adjudged that the said judgment of conviction and the said sentence be forthwith executed, and it is therefore further

Ordered and adjudged, That the said defendant be imprisoned in the Monroe County Penitentiary for a period of two months and that in addition thereto he pay a fine of two hundred and fifty dollars (\$250.00) and that in default of the payment of said fine he be imprisoned in the said penitentiary for an additional thirty days to commence at the expiration of the first mentioned two months' imprisonment;

Ordered and Adjudged, That the Sheriff of the County of Monroe, N. Y., is hereby commanded to arrest the said defendant, Benjamin Rosenthal, and forthwith convey him to the Monroe County Penitentiary, and deliver him into the custody of the Superintendent of said institution, to be by said Superintendent detained and imprisoned as hereinbefore provided, and this shall be the authority of the said Superintendent and Sheriff for so doing.

JAMES L. HOTCHKISS,
County Clerk, Monroe County, N. Y.

Enter.

J. B. M. S.

53 Supreme Court, United States of America.

BENJAMIN ROSENTHAL, Plaintiff in Error,
ag't

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

STATE OF NEW YORK,

County of Monroe, City of Rochester, ss:

To the Supreme Court of the United States:

Pursuant to a Writ of Error allowed by Hon. Horace H. Lurton, Associate Justice of the Supreme Court of the United States, and dated, signed and sealed the 5th day of March, in the year of our Lord one thousand nine hundred and ten, by Hon. James H. McKenney, Clerk of the Supreme Court of the United States, directed to the Judges of the County Court of Monroe County, State of New York, which said Writ is hereto annexed;

I, James L. Hotchkiss, County Clerk of Monroe County, State of New York and the Clerk of the County Court of Monroe County, State of New York, hereby make return to the said Writ and certify under my hand and the seal of the said County Court of Monroe County and the said County of Monroe that the foregoing is a true and correct copy of the record and proceedings and the rendition of judgment of a plea in the said County Court on a Remittitur from

54 the Court of Appeals of the State of New York, the same being the highest Court of law and equity of the State of New York in an action between The People of the State of New York, Plaintiff-Respondent, and Benjamin Rosenthal, Defendant-Appellant, wherein rights, privileges and immunities are claimed under the Constitution of the United States, and wherein was drawn in question the validity of a Statute of and an authority exercised under said State of New York, and wherein the decision was against the rights, privileges and immunities, especially set up or claimed under such constitution and in favor of the validity of such Statute and authority;

And I further annex hereto and return to Your Honorable Court herewith the said Writ, the petition therefor, the assignment of errors thereon, and the citation therewith, and further certify under my hand and the said seal that the said Writ, petition, assignment of error and citation were served upon me as such Clerk and duly filed in my office on the 8th day of March in the year of our Lord one thousand nine hundred and ten.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County Court and said County, this 16th day of March, A. D. 1910.

[Seal Monroe County, Rochester, N. Y.]

JAMES L. HOTCHKISS,

Clerk of the County Court of Monroe County, N. Y.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the County Court of Monroe County, State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said County Court of Monroe County of the State of New York on a remittitur from the Court of Appeals of the State of New York, that being the highest Court of law or equity of said State of New York, in which a decision could be had, before you or one of you in an action between the People of the State of New York, plaintiff respondent and Benjamin Rosenthal, defendant appellant, wherein rights, privileges and immunities are claimed under the constitution of the United States, and wherein was drawn in question the validity of a statute of and an authority exercised under said state of New York and wherein the decision was against the rights, privileges and immunities, especially set up or claimed under such constitution and in favor of the validity of such statute and authority, a manifest error has happened to the great damage of the said Benjamin Rosenthal, as by his complaint appears; we being willing that the error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid, do command you that if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Su-

56 preme Court of the United States, together with this writ, so that you may have the same at Washington within thirty (30) days from the date hereof in the said Supreme Court, of the United States, to be then and there *heard*; that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, which of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 5 day of M'ch. in the year of our Lord, one thousand nine hundred and ten.

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

HORACE H. LURTON.

*Associate Justice of the Supreme
Court of the United States.*

This Writ of Error to operate as a supersedeas upon the pl'tff in error entering into bond conditioned as required by law in the sum of five hundred dollars, which has this day been done.

HORACE H. LURTON,
Associate Justice, &c.

57 [Endorsed:] Mar. 8, 1910. Supreme Court of the United States. Benjamin Rosenthal, Plaintiff in Error, against The People of the State of New York, Defendant in Error. [Original.] Writ of Error. Filed Mar. 8, 1910. Monroe Co. Percival D. Oviatt, Attorneys for Plaintiff in Error, #928 Granite Bldg., Rochester, N. Y.

58 Supreme Court of the United States.

BENJAMIN ROSENTHAL, Plaintiff in Error,
against

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

To the Supreme Court of the United States:

The petition of Benjamin Rosenthal, of the City of Rochester, County of Monroe, and State of New York, respectfully shows to this Court:

That a judgment convicting your Petitioner of the crime of receiving stolen property was rendered by the County Court of the County of Monroe, State of New York, on the 17th day of December, 1908.

That on or about the same day, the said County Court denied your petitioner's motion for an arrest of said judgment. Thereafter the said judgment and order, upon appeal by your petitioner, was af-

firmed by the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department; and thereafter and on or about the 21st day of February, 1910, upon appeal of your petitioner, the order of the said Appellate Division affirming the said judgment and order, and the said judgment and order of the said Trial Court, were affirmed, by the Court of Appeals of the State of New York; and after such affirmance the said Court of Appeals sent its judgment of affirmance and the record therein to the said County Court of the County of Monroe, and the said record, in accordance with the laws of the State of New York will remain there, and all of the said judgments and orders are entered there.

59 That the said final judgment of the said Court of Appeals has been made and entered as a final judgment of the said County Court.

That the said Court of Appeals of the State of New York is the highest Court of said state in which a decision of the said matter could be had. In the said matter, rights, privileges and immunities were claimed by your petitioner under the Constitution of the United States, and there was drawn in question the validity of a statute of and an authority exercised under the State of New York, and the decisions and judgments and orders of the said Monroe County Court and the said Supreme Court, Appellate Division, Fourth Department, and the said Court of Appeals of the State of New York, were against the rights, privileges and immunities of your petitioner, especially set up and claimed by your petitioner under said Constitution, and were in favor of the validity of such statute and authority.

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Monroe County Court of the State of New York for the correction of errors and for a reversal of the judgment as complained of; and that a transcript of the record proceedings and papers in this action duly authenticated, may be sent to said Supreme Court of the United States.

And your petitioner will ever pray.

BEN'M ROSENTHAL.

Dated at Rochester, N. Y., February 21, 1910.

The writ of error as prayed for in the foregoing petition is hereby allowed this 5 day of M'ch, 1910.

HORACE H. LURTON,

Associate Justice of the Supreme Court of U. S.

60 STATE OF NEW YORK,

County of Monroe, City of Rochester, ss:

Benjamin Rosenthal being duly sworn deposes and says that he is the Petitioner in this action; that he has read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged

upon information and belief, and as to those matters he believes it to be true.

BEN'M ROSENTHAL.

Sworn to before me this 21 day of February, 1910.

OSCAR W. GUELICH,
Notary Public.

Notary's Affidavit.

STATE OF NEW YORK,

Monroe County Clerk's Office, Rochester, N. Y., ss:

I, James L. Hotchkiss, Clerk of the County of Monroe, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do certify, that Oscar W. Guelich, Esq., before whom the foregoing declarations or affidavits were made, was, at the time of taking the same, a Notary Public, in and for said County of Monroe, duly authorized to take the same; that I am well acquainted with his handwriting, and verily believe that the signature to said Certificate is his genuine signature.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Courts, this 21 day of February A. D., 1910.

[Seal Monroe County, Rochester, N. Y.]

JAMES L. HOTCHKISS, *Clerk.*

61 [Endorsed:] Supreme Court of the United States. Mar. 8, 1910. Benjamin Rosenthal, Plaintiff in Error, against The People of the State of New York, Defendant in Error. [Original.] Petition for Writ of Error. Filed Mar. 8, 1910, Monroe Co. Wile & Oviatt, Attorneys for Plaintiff in Error, #928 Granite Bldg., Rochester, N. Y.

62 Supreme Court of the United States.

BENJAMIN ROSENTHAL, Plaintiff in Error,
against

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Assignment of Errors.

Now comes the above named plaintiff in error, the said Benjamin Rosenthal by Percival De Witt Oviatt, his Attorney, and in connection with the petition for the writ of error filed herein, he now files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause, and shows that in the record and in proceedings aforesaid there is manifest error in every one of the following rulings and decision, to-wit:—

I. The Court of Appeals of the State of New York erred in deciding that the Laws of the State of New York, known as the Laws of 1903, Chapter 326, are constitutional under the Constitution of the

United States, when it should have decided that the said Laws are unconstitutional, because they are in conflict with the fourteenth amendment of the Constitution of the United States, in that they abridge the privileges and immunities of the plaintiff in error.

II. The Court of Appeals of the State of New York erred in deciding that the Laws of the State of New York, known as the Laws of 1903, Chapter 326, are constitutional under the Constitution of the United States, when it should have decided that the said Laws are unconstitutional, because they are in conflict with the fourteenth amendment of the Constitution of the United States, in that they deprive the plaintiff in error of liberty and property without due process of law.

III. The Court of Appeals of the State of New York erred in deciding that the Laws of the State of New York, known as the Laws of 1903, Chapter 326, are constitutional under the Constitution of the United States, when it should have decided that the said Laws are unconstitutional, because they are in conflict with the fourteenth amendment of the Constitution of the United States, in that they deny to the plaintiff in error the equal protection of the Laws.

IV. The said Court erred in deciding that the motion of the plaintiff in error in arrest of judgment should not have been granted, whereas it should have decided that said motion ought to have been granted, because the said Statute is unconstitutional, as hereinbefore specified.

And he, the said Benjamin Rosenthal, therefore prays that the judgment aforesaid may be reversed and annulled, and held for nothing, and that he may be restored to all the things which he has lost by occasion of said judgment.

PERCIVAL D. OVIATT,
Attorney for Plaintiff in Error,
928 Granite Building,
Rochester, N. Y.

64 [Endorsed:] Supreme Court of the United States. Mar. 8, 1910. Benjamin Rosenthal, Plaintiff in Error, against The People of the State of New York, Defendant in Error. [Original.] Assignment of Error. Filed Mar. 8, 1910, Monroe Co. Percival D. Oviatt, Attorney for Plaintiff in Error. #928 Granite Bldg. Rochester, N. Y.

65 UNITED STATES OF AMERICA, ss:

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Monroe County Court of the State of New York in a case wherein Benjamin Rosenthal is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. ———, Associate Justice of the said Supreme Court of the United States this 5 of M'ch in the year of our Lord, one thousand nine hundred and ten.

HORACE H. LURTON,
*Associate Justice of the Supreme
Court of the United States.*

Attest:

———, *Clerk.*

66 [Endorsed:] Supreme Court of the United States. Mar. 8, 1910. Benjamin Rosenthal, Plaintiff in Error, against The People of the State of New York, Defendant in Error. [Original.] Citation. Filed Mar. 8, 1910, Monroe Co. Percival D. Oviatt, Attorney for Plaintiff in Error, 9th Floor Granite Bldg., Rochester, N. Y. Crim. papers.

67 THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
vs.
BENJAMIN ROSENTHAL, Appellant.

VANN, J.:

The indictment in question was found under section 550 of the Penal Code as amended in 1903 by chapter 326 of the laws of that year. As amended it reads as follows: "Sec. 550. Criminally receiving property.—A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation has been committed within the state, whether such property were stolen or misappropriated within or without the state, *or who being a dealer in or collector of junk, metals or second-hand materials, or the agent, employee, or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company without ascertaining by diligent inquiry, that the person selling or delivering the same has a legal right to do so*, is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment."

The part printed in italics was added by the amendment, no other change being made, and the section, as thus amended, was re-

68 enacted in the Penal Law (Sec. 1308). The defendant claims that the amended portion does not describe an offense and that it is unconstitutional, because it applies only to junk dealers, protects only the property of railroad, telephone, telegraph, gas and electric light companies, makes a test of criminality something which can seldom be ascertained by the junk dealer and imposes on him the possibility of a criminal prosecution in connection with every transaction he undertakes, as well as the necessity of ascertaining the legal right of the seller, regardless of the fact whether or not the property has been the subject of a larceny.

The first question to be considered is what does the amendment mean? The entire section, including the amendment, consists of a single sentence divided only by commas. It provides for the punishment of any person who receives stolen property knowing it to have been stolen, or who corruptly and for a consideration conceals any property knowing it to have been stolen, and then, in the same sentence, for the punishment of a person, who, being a dealer in junk, buys or receives stolen wire or metals of a certain kind, belonging to a railroad or other company named, without making diligent inquiry to ascertain that the person selling the same had a legal right to do so. While the amendment alone does not read in that way, we think that when the entire sentence is read together, as obviously it should be, it shows this to have been the intention of the legislature.

Prior to the amendment the legislature had provided for the punishment of one who receives stolen property knowing it to have been stolen, which under our decisions means not only actual knowledge, but also constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred. (People v. Wilson, 151 N. Y. 403; People v. Dowling, 84 N. Y. 478, 485.) It had also provided for the punishment of one who corruptly conceals property knowing it to have been stolen. By 69 an act passed the day before the amendment in question, it had defined the "junk business" as "the business of buying or selling old metal," and had required junk dealers, except in cities of the first class, not only to take out a license, but, when purchasing such property, to procure a written statement from the seller "as to when, where and from whom he obtained" the same and file it with the sheriff or chief of police. (L. 1903, ch. 308.) By the next chapter, passed on the same day, it had prohibited junk dealers from purchasing from "any child under the age of sixteen years." (L. 1903, ch. 309.) These provisions, however, still left a dangerous loophole for unscrupulous junk dealers, who might outwardly conform to the law and yet be guilty of receiving stolen property, knowing or having reason to know it had been stolen, when it would be difficult if not impossible, owing to the nature of the business and the way it is carried on, to prove knowledge or circumstances imputing knowledge. The legislature is presumed to have been familiar with current history and the decisions of the courts, which show that property of a certain kind, such as copper, brass, iron, etc., is frequently stolen from railroad, telegraph and similar corporations,

which cannot adequately protect it because it is scattered through the country along extensive lines of transportation or communication, and which is exposed to view and caption by the evil minded, who find their best market in the shops of certain junk dealers. These second-hand materials are usually of such shape and form as to indicate at a glance use and ownership by a corporation of the kind specified. The legislature obviously intended to afford the special protection needed by owners of this kind of property by placing those dealing in it, when second-hand, under the risk of buying at their peril unless they make diligent inquiry to ascertain whether those offering it for sale had the legal right to sell it. This

70 intention, while somewhat awkwardly expressed, as well as the intention to make the entire sentence apply to stolen property, is reasonably clear when the history of legislation, the evil needing redress and the context are taken into account. The successive steps taken by the series of statutes show that the object of the legislature was to afford all the protection possible against the evil of receiving stolen property, when the receiver either knew or should have known that it was stolen. By adding the duty of diligent inquiry before purchasing, it protects the junk dealers who in good faith comply with the statute and provides for the punishment of those who do not.

Under this construction, the attack upon the substance of the indictment has no foundation, for the statute upon which it rests is not open to objection under either Constitution, State or Federal. The legislature had the power to confine the amendment to junk dealers, because they are way-wise and furnish the chief if not the exclusive market for stolen property. It had power to provide special protection to property of a certain kind widely used and owned by all corporations of a certain class, because such property, owing to its situation and nature, and such owners, owing to the impossibility of adequately watching and guarding it, need special protection as shown by long experience. While it makes the proper discharge of an active duty a "test of criminality," all that is required is good faith and honest inquiry, and that is no more than is required by the common law in some cases, especially in the purchase of commercial paper under certain circumstances. The junk dealer is not responsible for the truth of what he ascertains by inquiring, but he runs the risk if he purchases without diligent inquiry to ascertain the truth. The legislature had the right to declare a junk dealer, who purchases stolen property of a kind

71 that is the constant subject not only of larceny but of sale to junk dealers, guilty of a crime, whether he actually knew it had been stolen or not, provided he did not try to find out by making diligent inquiry.

The second indictment was regularly found and it superseded the first. The Revised Statutes provided that "If there be at any time pending against the same defendant, two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found, shall be deemed to

be superseded by such second indictment, and shall be quashed." (2 R. S. Part 4, chap. 2, tit. 4, art. 2, Sec. 42.) The first indictment, therefore, was not of itself a bar to the second. (*People v. Fisher*, 14 Wend. 914.) The section quoted was expressly excepted from the repealing act passed on the 5th of June, 1886, and is now Section 292^a of the Code of Criminal Procedure. (L. 1886, ch. 593, p. 829; L. 1909, ch. 66, Sec. 1, p. 84.)

The People take nothing from the order of resubmission, which was a nullity, as the county judge held and as all now concede. No order to resubmit, however, was necessary, for the Grand Jury had jurisdiction to reindict without one. The defendant was not put in jeopardy by the first indictment, as he was not arraigned thereunder, nor did he demur or plead thereto. If he had demurred and the demurrer had been sustained, a second indictment could not have been lawfully found without an order of resubmission as authorized by the Code of Criminal Procedure, which has modified the practice at common law in this regard to some extent. (Code Cr. Proc., Sec. 327, 329.) By the express command of the statute a judgment sustaining a demurrer is a bar to a further prosecution for the same offense unless such an order is made. (Id. Sec. 327.) No order to resubmit is required, however, unless the defendant has been put in jeopardy under a former indictment. Even if the indictment is set aside on motion, it is not a bar to a further prosecution, although the defendant is entitled to be discharged from custody. "Unless the Court direct that the case be resubmitted to the same or another Grand Jury." (Id. Sections 317-320.)

We find no error in the record that affects the judgment of conviction. The appeal from the order of resubmission is dismissed, but the other order and the judgment of conviction are affirmed.

Cullen, Ch. J., Willard Bartlett, Hiscock and Chase, JJ., concur; Werner, J., not voting; Edward T. Bartlett, J., absent.

Orders and judgment of conviction affirmed.

73 Supreme Court, United States of America.

BENJAMIN ROSENTHAL, Plaintiff in Error,
ag't

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

It is hereby stipulated between the respective parties in the above entitled action and proceeding that annexed hereto is a true and correct copy of the Opinion of the Court of Appeals rendered in an action entitled, The People of the State of New York, Plaintiff-Respondent, against Benjamin Rosenthal, Defendant-Appellant, and from the judgment in which action rendered by the said Court of Appeals, (and in rendering which the said Opinion was written and filed by the said Court of Appeals), this proceeding is brought to

this Court on Writ of Error to the County Court of Monroe County, N. Y.

Dated, Rochester, N. Y., March 16th, 1910.

P. D. OVIATT,

Attorney and Counsel for Plaintiff in Error.

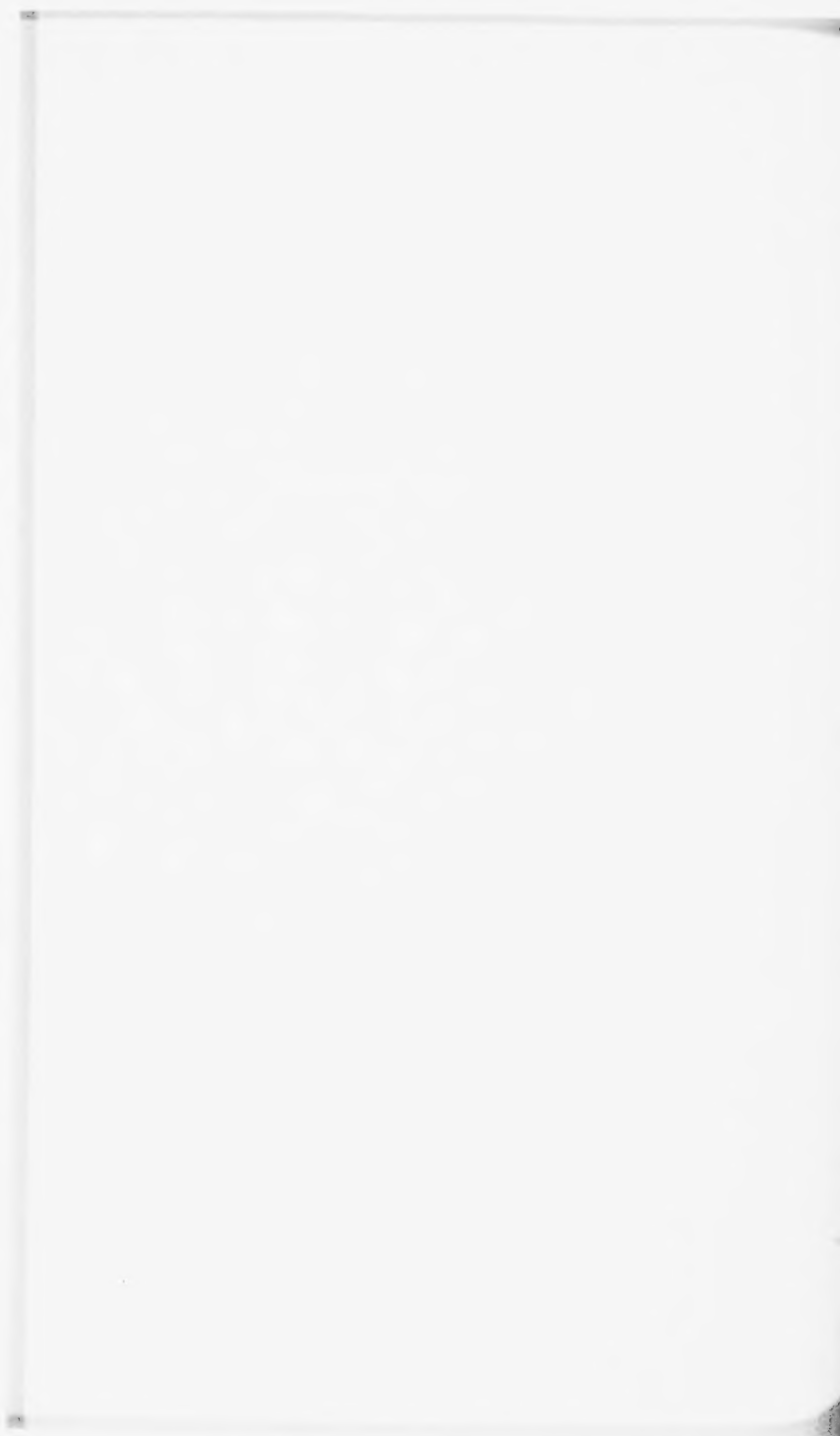
F. F. ZIMMERMAN,

Attorney and Counsel for Defendant in Error.

74 [Endorsed:] 491—10/22089. Supreme Court, United States of America. Benjamin Rosenthal, Plaintiff in Error, vs. The People of the State of New York, Defendant in Error. Opinion of Court of Appeals and Stipulation.

75 [Endorsed:] File No. 22,089. Supreme Court U. S., October Term, 1910. Term No. 491. Benjamin Rosenthal, Pl'ff in Error, vs. The People of the State of New York. Opinion of the Court of Appeals of the State of New York and stipulation of counsel in relation thereto. Filed October 8, 1910.

Endorsed on cover: File No. 22,089. New York, County Court Monroe County. Term No. 246. Benjamin Rosenthal, plaintiff in error, vs. The People of the State of New York. Filed April 7th, 1910. File No. 22,089.



76
No. 28

Office Supreme Court,
FILED.

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JOHN H. GREEN

SUPREME COURT OF THE UNITED STATES

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BENJAMIN SOBENTHAL, PLAINTIFF IN ERROR

VS.

THE PEOPLE OF THE STATE OF NEW YORK

DEFENDANT IN ERROR

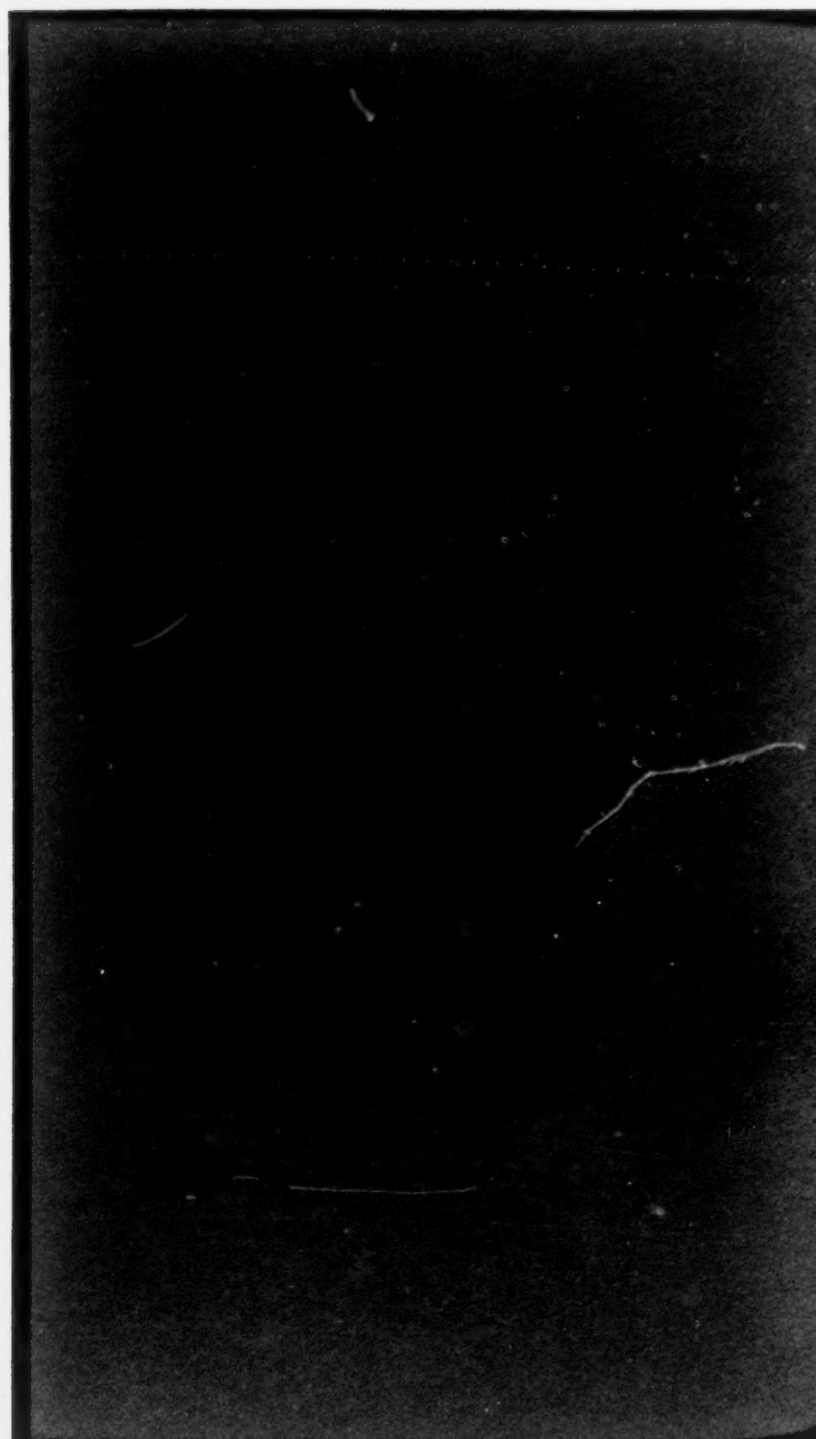
BRIEF FOR PLAINTIFF IN ERROR

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Rochester,

New York.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 246.

BENJAMIN ROSENTHAL, PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This cause is brought into this Court by writ of error dated March 5, 1910, and addressed to the Judges of the County Court of Monroe County of the State of New York.

The question involved is, whether Chapter 326 of the Laws of 1903 of the State of New York is constitutional, or whether the Statute violates the Fourteenth Amendment of the Constitution of the United States for the reason that it abridges the privileges and immunities of the plaintiff in error, and deprives him of liberty and property without due process of law, and denies him the equal protection of the laws.

The manner in which the questions were raised was by a motion in arrest of judgment after the plaintiff in error had pleaded guilty to a violation of the Statute; the motion in arrest being based upon the constitutional grounds.

The Indictment.

The Indictment was for receiving stolen property; it consisted of four counts. The second, third, and fourth counts alleged respectively that the plaintiff in error had purchased stolen property knowing that the same had been stolen; had concealed stolen property knowing that the same had been stolen; and had aided in concealing the property knowing it to have been stolen.

The first count of the indictment alleged, that the plaintiff in error, "*being then and there a dealer in and collector of junk, metals, and second-hand materials bought 180 pounds of copper wire * * * * the same then and there consisting of copper wire used by and belonging to * * * * the Bell Telephone Company of Buffalo * * * * without ascertaining by diligent inquiry that the said persons so selling and delivering the same had a legal right to do so.*"

The second, third, and fourth counts of the indictment were dismissed upon motion of the District Attorney.

The defendant pleaded guilty to the first count.

A motion in arrest of judgment upon the ground that the Statute involved was unconstitutional, was made and denied. An appeal was taken by the plaintiff in error to the Appellate Division of the State of New York, and from an adverse ruling he again appealed to the Court of Appeals. The Court of Appeals sustained the Statute and wrote an opinion (33). The record was remitted to the Monroe County Court and the plaintiff in error then obtained the writ of error involved in this Court.

The Statute Involved.

Prior to 1903, section 550 of the Penal Code of the State of New York, was in the following language: "*A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation had been committed within or without the state, is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment.*"

It will be noticed that the second, third, and fourth counts of the indictment are drawn to fit the Statute above quoted.

By the laws of 1903, chapter 326, the above section 550 was

amended. The amendment did not change the Statute, except that it added and defined another distinct crime to those already defined. The amendment left intact the original Statute, and without changing its scope in any particular, it added the following "or who, *being a dealer in, or collector of* "junk, *metals or second-hand materials, or the agent, employee, or representative of such dealer or collector buys or* "receives any *wire, cable, copper, lead, solder, iron or brass* "used by, or belonging to a railroad, telephone, telegraph, gas "or electric light company, *without ascertaining by diligent* "inquiry that the *person selling or delivering the same has a* "legal right to do so" is guilty of criminally receiving such property and can be imprisoned for five years and fined two hundred and fifty dollars (\$250.00).

The first count to the indictment upon which the conviction rests is a count drawn to fit this amendment just quoted.

A Specification of the Errors Relied Upon.

The error relied upon is that the motion in arrest of judgment should have been granted and the Courts of the State of New York erred because,—

1. They should have decided that the amendment quoted above was in conflict with the Fourteenth Amendment of the United States Constitution because it abridged the privileges and immunities of the plaintiff in error.

2. They should have decided that the amendment quoted above was in conflict with the Fourteenth amendment of the Constitution of the United States because it deprived the plaintiff in error of his liberty and property without due process of law.

3. They should have decided that the amendment quoted above was in conflict with the Fourteenth amendment of the Constitution of the United States, because it denied to the plaintiff in error the equal protection of the laws.

THE ARGUMENT.

POINT I.

The Statute (Laws of 1903, Chapter 326) Is Unconstitutional Even Though Interpreted as it was Interpreted by the New York Court of Appeals.

In the Courts of New York, this plaintiff in error had con-

tended that the law was unconstitutional because,—

1. The laws relating to criminally receiving stolen property as they existed prior to 1903, were adequate to protect against the evils involved.

2. The Statute applies only to dealers in metals, etc., and is class legislation based upon illogical and arbitrary distinctions.

3. The Statute protects the property of only railroad, telephone, gas, and electric Companies, and is class legislation based upon illogical and arbitrary distinctions.

4. The Statute required the plaintiff in error to *ascertain* something which can seldom be ascertained with accuracy, and makes a test of criminality that which is frequently a question of law, and imposes on the plaintiff in error the possibility of a criminal prosecution in the connection with all his transactions.

5. The property purchased by the plaintiff in error, or any person similarly situated, *need not have been stolen*; but such a person becomes a felon if he fails to ascertain the *legal right* of the seller to sell the property.

This Statute had never been interpreted by any of the Courts of the State of New York prior to the decision of the highest Court in this Case.

The plaintiff in error argued this case in the Monroe County Court and no opinion was written.

The plaintiff in error argued this question in the Appellate Division of the Supreme Court of the State of New York, and no opinion was written.

The Court of Appeals of the State of New York wrote an opinion and determined that, notwithstanding the unequivocal and plain meaning of the Statute, *there was to be read into it the element that before one became guilty within it, the property purchased had to be stolen* and the additional element that the person buying the property need not ascertain the legal right of the vendor to sell it, but need only make *diligent effort* to ascertain such legal right.

In this point, we shall argue, that within the meaning which is attached to the Statute by the Court of Appeals the enactment is, nevertheless, unconstitutional.

1. The laws relating to criminally receiving stolen property as they existed prior to 1903, were adequate to protect against the evils involved.

The Penal Code provides that anyone who buys or receives property, knowing it is stolen, is guilty of a felony; and anyone who conceals, or withholds, or aids in the concealment or withholding of such property, is guilty of a felony. The decisions hold that actual knowledge of the fact that the property is stolen is unnecessary. The surrounding circumstances, for instance, such as buying at an undervaluation, or any other element such as would put an honest or prudent man on inquiry, is sufficient to convict under the Statute. (*People vs. Wilson*, 151 N. Y., 403; *People vs. Dowling*, 84 N. Y. 478, 485).

As the Court of Appeals said in the case at bar:

"Prior to the amendment the Legislature had provided for the punishment of one who receives stolen property knowing it to have been stolen, *which under our decisions means not only actual knowledge, but also CONSTRUCTIVE knowledge through notice of facts and circumstances from which guilty knowledge may fairly be inferred*" (34).

Chapter 308 of the Laws of 1903, compels every junk dealer to obtain a license.

It further provides that when a junk dealer purchases any pig iron, or pig metal, or copper wire, or brass car journals, he shall cause a statement to be subscribed by the person who sells him the property, as to when, where, and from whom the seller obtained the property, and also the residence, etc., of the seller. This statement must be filed with the Chief of Police. The law further provides that a junk dealer when purchasing the property described, must keep such purchase absolutely separate and distinct, without any change or mutilation, for a period of five days after the purchase, and shall tag it with a tag bearing the particulars of the purchase.

A violation of the Act is made a misdemeanor. The Act is not applicable to cities of the first class but those cities have all dealt with the subjects involved in a manner at least as comprehensive as the statute.

Section 290, Sub. 6 of the Penal Code provides that no junk dealer shall receive or purchase anything from a child under sixteen years of age.

The laws of 1907, Chapter 755 (The New Charter of the City of Rochester) give the City full power to regulate the business of junk dealers, and the Court will probably take judicial notice of the fact that all cities which have the power,

have adopted ordinances regulating the business to the extent, at least, of compelling reports to the Police and a retention of the property bought, etc., etc., for a certain period of time. (See Ordinances of Rochester, Vol. 2, pages 88, 91, 93, 100; New Charter, Sec. 86, Sub. 1).

At any rate, the Statute which we attack cannot be constitutional as to cities of the first class, and unconstitutional as to all other places.

We thus have a complete system of laws which accomplish the following purposes:

(A) Compel junk dealers to be licensed.

(B) Compel junk dealers to report to Chiefs of Police, property of the character peculiarly subject to theft.

(C) Compel junk dealers to keep property of that character, intact, separate, and unmutilated for such a period as may be necessary for investigation, if anyone wishes to investigate.

(D) Compel junk dealers to file with certain public officers full information in writing signed by the person selling the property.

(E) *Make all persons*, regardless of their business, guilty of the crime of criminally receiving stolen property, where any circumstance in connection with the purchase would indicate to a prudent man that the transaction was suspicious or involved any moral obliquity.

The Court of Appeals in referring to these various provisions said in the case at bar:

"These provisions, however, still left a dangerous loop-hole for unscrupulous junk dealers, who might outwardly conform to the law and yet be guilty of receiving stolen property, knowing or having reason to know it had been stolen, when it would be difficult, if not impossible, owing to the nature of the business and the way it is carried on, to prove knowledge or circumstances imputing knowledge." * * * *

"These *second-hand* materials are usually of such shape and form as to indicate at a glance use and ownership by a corporation of the kind specified. The legislature obviously intended to afford the special protection needed by owners of this kind of property by placing those dealing in it, when *second-hand*, under the risk of buying at their peril unless they

“make diligent inquiry to ascertain whether those offering it for sale *had the legal right to sell it*” (34, 35).

The Court of Appeals is in error. Chapter 308 of the Laws of 1903, as we have indicated, provided that a junk dealer shall have signed by the person who sells, a statement as to when, where, and from whom, the seller obtained any copper wire, or other metals, and provides, that the statement shall also contain the residence of the seller.

We submit that where a crime can be shown circumstantially, and where the necessary immoral or criminal element of buying stolen property under circumstances indicating that it had been stolen, can be proven by the surrounding facts and circumstances, there is no justification for a statute making an innocent person a felon simply to overcome the difficulty of proof in isolated criminal instances. As well might a statute be possible in aid of District Attorneys to the effect that all persons belonging to certain classes containing some criminals, shall by reason of belonging to such a class and carrying on their business, be guilty of the crimes to which some of the members of the class are peculiarly prone.

The Court of Appeals has fallen into a grievous error when they base their conclusions upon the assumption, *which is contrary to fact, that the property involved is second-hand property*. The property is *not* second-hand property; the property may be *new or old*.

The Court of Appeals has fallen into another error when it says,

“These *second-hand* materials are usually of such shape and form as to indicate *at a glance* use and ownership by a corporation of the kind specified.”

The statute does not say, “*copper wire*,” it says “*any wire*,” and “*any copper*.”

The Niagara Falls Power Company is not a railroad, telephone, gas, or electric light company. Its wire cannot be distinguished from the wire of any other company, and yet it has thousands upon thousands of miles of the wire stretched through the States of New York and Pennsylvania. We dare say there are thousands of such corporations throughout the United States.

What justification is there for the Court of Appeals to say *that the materials are usually of such shape and form as to indicate use of ownership?*

Cable is not a species of property which is peculiarly used or owned by such corporations as the statute names.

Copper is not. The Western Electric Co. is not within the statute because it manufactures electric equipment and machinery, and yet it uses a large percentage of the copper consumed in New York State.

Just how it is possible for the purchaser of copper wire or iron wire, or steel wire, to know whether or not, it belongs to the Company which manufactures the wire, or belongs to a telephone company, which uses the wire is past understanding. How to distinguish between such ownership because of the "shape and form" of *any* copper or *any* wire or even copper wire (*new or old*) is most mysterious, although the Court of Appeals say: "*that it is indicated at a glance.*" And so with *lead*; and so with *solder*. And then you come to *iron*. Just what there is about a horseshoe which belongs to the Electric Light Company to indicate that it belonged to such a company, instead of to some carting company, or fell from the foot of one of Belmont's horses, passes our comprehension; and yet, the Court of Appeals has said that its "*shape and form*" "*indicate*" such ownership and use "*at a glance.*"

The illustration could be multiplied indefinitely,—with each illustration confuting and denying to a greater and greater extent the statement of the Court of Appeals.

The fact is, and must be, that these various metals in their multitudinous and infinite variety of forms, bear upon their face no such marks or distinctive characteristics which can be said to indicate their use or ownership by the corporations named. Of course, there are instances where it is true that the articles do bear such indicia. For example, one might reasonably imagine that a locomotive belonged to a railroad company. But even in this extreme case, one could not be sure of it; because the locomotives in use on the barge canal of the State of New York and upon the Panama canal, and upon all large works requiring such machinery, and the locomotives which are owned by lumbering companies and others, would apparently come within the statute, and yet actually be utterly and wholly without it.

And so we come to the conclusion announced in this head, that after all the laws prior to this amendment which we are attacking, were adequate to protect against the evils involved, and had, at least, a basis in sanity and common sense. They protected against the criminal acts and moral delinquency as

we shall proceed to show. The amendment in question breeds confusion and leads to infinite absurdity.

2. The statute applies only to dealers in metals, &c., and is class legislation based upon illogical and arbitrary distinctions.

We do not intend to destroy the force of our valid argument by claiming too much or by flying in the face of well established principles.

At the outset we dare to *concede the abundant RIGHT of the Legislature to REGULATE the junk business*; we concede its abundant power to do the things which it has done in the Statutes to which we have referred.

The Legislature may do a host of reasonable and necessary things; it may compel licenses to be obtained; it may compel reports of property purchased to be filed; it may compel the property purchased to be isolated for a fixed period after such a report; it may do many other things in regulation of the business; and it may visit any infringement of its mandates with a criminal penalty.

We claim under this head that the Legislature had no right to say, that the dealer in metals after obeying the regulations referring to his occupation, becomes a felon, though his purpose be innocent, merely because he does not perform some active duty, and make diligent effort to ascertain the solution of a legal question. If the property which we are discussing is peculiarly susceptible to theft, *then there is no reason that ALL persons should not be subjected to the same rules with reference to its purchase.*

While the plaintiff in error has been designated as a junk dealer, it is not improper for us to say that he is the proprietor of a large wholesale business; he is not a peddler who goes about collecting these materials; he is a business man, dealing with large affairs, and with property in large amounts and of great value.

It is a matter of common knowledge that these metals are salvaged and ultimately go to the Steel and Iron mills for the manufacture of the ordinary product of such mills. If it be true that the dealer in metals affords a market for such property, and, because of that, he becomes in some degree morally responsible for, and a temptation to, the original theft, then it is clearly true, that the steel and iron mill is responsible for the dealer's position and influence. There is no reasonable

distinction in logic or in law for saying that one person who deals in this character of property should be a felon because of the failure to perform any active duty, in spite of the fact that his purpose is moral and his conscience is clear; and all other persons, who from day to day deal in the same property, or who occasionally deal in such property, should, *under the same set of circumstances, be innocent men.*

It is a matter of common knowledge that "fences" exist with reference to properties altogether different than the property which we are discussing. They are, as a class, the pawnbrokers and the second-hand dealers. Many states have regulated these classes in most stringent ways. But we have yet to hear of a law anywhere in these United States, which makes persons felons, merely because they did not exercise diligent effort to ascertain the existence of a *legal* right.

"The Police power however broad and extensive, is
 "not above the Constitution. When it speaks, its voice
 "must be heeded. It furnishes the supreme law, the
 "guide for the conduct of legislators, judges and private
 "persons, and so far as it imposes restraints, the Police
 "power must be exercised in subordination thereto."

"But under the pretense of prescribing a Police
 "regulation, the State cannot be permitted to encroach
 "upon any of the just rights of the citizen which the
 "Constitution intended to secure against abridge-
 "ment."

If the Police power were not subject to such limitations "the power of the Legislature would be practically without limitation. In the assumed exercise of "the Police power in the interest of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away. * * * * Under the mere guise of "Police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body,

“declare that it is intended for the improvement of the
 “public health. Such a declaration does not conclude
 “the courts, and they must yet determine the fact de-
 “clared and enforce the supreme law” (and so, of
 course, with reference to the public safety). (*Matter of
 Application of Jacobs* 98, N. Y., 106, 107, 108, 109, 110).

The last case declares unconstitutional the law prohibiting the manufacture of cigars in tenement houses in certain cases. See also *People vs. Marx* 99 N. Y., 377, declaring unconstitutional the law making it a crime to manufacture or sell a substitute for butter, cheese, etc., etc.; *People, ex rel Madden vs. Dycker*, 72 A. D., 308 declaring unconstitutional the law prohibiting the issue and use of trading stamps; *Schnaier vs. Navarre Hotel & Importation Co.*, 182 N. Y. 83, declaring unconstitutional the law compelling the registration of plumbers in the City of New York. In the last case, the Court, without the use of quotation marks, made use of the language of the *Jacobs* case to a large extent. (See page 88).

See also *Wright vs. Hart*, 182 N. Y. 330 declaring unconstitutional the Act regulating the sale of merchandise in bulk. In this case the Court set out

“to show that the Statute under consideration is, in
 “some particulars, so thoroughly unrelated to the prob-
 “able object of its enactment, and in others so cumber-
 “some, burdensome, unreasonable and unworkable, as to
 “violate every one of the constitutional provisions
 “under which it is challenged. * * * Any law
 “that interferes with the right to make and enforce con-
 “tracts affects both the liberty and property of the citi-
 “zen. The right to sell and purchase merchandise in
 “bulk is no less under the protection of the Constitution
 “than the right to sell and buy in the smallest possible
 “quantities.”

One of their reasons for holding the Act unconstitutional was that the merchant was prohibited from

“doing that which is permitted to all other men. Mer-
 “chants comprise a comparatively small number of the
 “community at large and, therefore, this would seem
 “to be class legislation which denies to those affected by
 “it the equal protection of the laws guaranteed by the
 “14th amendment to the Federal Constitution. * * *
 “First the Constitution and then the Police Power.”

See also *City of Buffalo vs. Linsman*, 113 A. D. 584 declaring unconstitutional an ordinance prohibiting peddling of farm products during certain business hours upon the ground that it was class Legislation and in restraint of trade, by restricting the sale of such products to grocers and shop keepers; *Fisher Co. vs. Woods*, 187 N. Y. 90 declaring unconstitutional the law making it a crime to offer for sale any real property without written authority from the owner; and *People vs. Williams*, 189 N. Y. 131 declaring unconstitutional the law forbidding employment of women in factories during certain hours of the night.

“The tendency of the times undoubtedly, is to rush to
 “the legislature for a cure for all the grievances of citi-
 “zens, whether real or imaginary, and many novel ex-
 “periments in legislation are the result. But usually in
 “case of wrongs penalties have been provided. It is
 “novel legislation indeed that attempts to take away
 “from all the people the right to conduct a given busi-
 “ness because there are wrong doers in it, from whose
 “conduct the people suffer. * * * *

“It is not contended that the business of ticket broker-
 “age is in itself of a fraudulent character. The busi-
 “ness can be honestly conducted; it has been so con-
 “ducted in the past by honest men engaged in it; and the
 “most that is asserted is that there are some men en-
 “gaged in the business who have imposed on the public.
 “The same assertion can be made with equal truth of
 “every business, trade and professional. Because some
 “coal dealers and vendors in sugar cheat in weight, and
 “dealers in paint and oil in measurements, and in tobac-
 “co in quality, it has not hitherto, we venture to say,
 “been thought the proper remedy to make it a felony
 “for persons to hereafter engage in such business, un-
 “less they shall have been duly appointed as agents by
 “the corporations manufacturing or producing the pro-
 “duct.” (*People ex. rel. Tyroler vs. Warden of Prison*,
 157 N. Y. 116, declaring unconstitutional the Act limit-
 ing the sale of tickets). We do not cite this case as a
 parallel, but we have used the quotation, because its reasoning
 is peculiarly applicable.

Within the language of *Lochner vs. New York* 198 U. S. 45,
 56; 49 *Lawyer's Ed.* 937, 941; this Statute in question is,

“an unreasonable, unnecessary, and arbitrary interfer-

“ence with the right of the individual to his personal
“liberty, or to enter into those contracts in relation to
“labor which may seem to him appropriate or necessary
“for the support of himself and his family.”

As was said in *Cotting vs. Godard*, 183 U. S. 79, 107; 46 Law. Ed., 92, 108, “but arbitrary selection can never be justified by
“calling it classification. The equal protection demand-
“ed by the 14th Amendment forbids this.”

No language is more worthy of attention and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, *Yickwo vs. Hopkins*, 118 U. S. 356, 369;

“When we consider the nature and the theory of our
“institutions of government, the principles upon which
“they are supposed to rest, and review the history of
“their development, we are constrained to conclude that
“they do not mean to leave room for the play and ac-
“tion of purely personal and arbitrary power.”

In *Magoun vs. Illinois Trust and Savings Bank*, 170 U. S., 283, 294; 42 Law. Ed. 1037, 1043, the Court said, quoting from a prior case, “‘It is apparent that the mere fact of classifica-
“‘tion is not sufficient to relieve a statute from the
“‘reach of the equality clause of the 14th Amendment,
“‘and that in all cases it must appear, not only that a
“‘classification has been made, but also that it is one
“‘based upon some reasonable ground—some differ-
“‘ence which bears a just and proper relation to the
“‘attempted classification—and is not a mere arbitrary
“‘selection.’”

In *Gulf, C. and S. F. R. Co. vs. Ellis*, 165 U. S. 150; 41 Law. Ed. 666, the Court had consideration of a Statute of Texas, which in substance provided, that a Railroad which was defeated in an action brought to recover damages of less than Fifty dollars for stock killed or injured by a train, was to be liable for an attorney's fee, not to exceed \$10.00, this Court held the Statute unconstitutional and said, “considered as
“such, it is simply a statute imposing a penalty upon
“railroad corporations for a failure to pay certain
“debts. No individuals are thus punished, and
“no other corporations. The act singles out a certain
“class of debtors and punishes them when for like de-
“linquencies it punishes no others. They are not treated

"as other debtors, or equally with other debtors. They
 "cannot appeal to the courts as other litigants under
 "like conditions and with like protection. * * * *
 "It is no sufficient answer to say that they are punished
 "only when adjudged to be in the wrong. They do not
 "enter the courts upon equal terms. * * * *
 "In the suits, therefore, to which they are parties, they
 "are discriminated against, and are not treated as
 "others. They do not stand equal before the law. They
 "do not receive its equal protection. All this is obvi-
 "ous from a mere inspection of the statute."

Further on in the opinion, in answer to the argument that
 there was involved only the power of the Legislature to class-
 ify, the Court said: "yet it is equally true that such classifica-
 "tion cannot be made arbitrarily; * * * * Classi-
 "fication for legislative purposes must have some
 "reasonable basis upon which to stand. It must be evi-
 "dent that differences which would serve for a classifi-
 "cation for some purposes furnish no reason whatever
 "for a classification for legislative purposes. The dif-
 "ferences which will support class legislation must be
 "such as in the nature of things furnish a reasonable
 "basis for separate laws and regulations."

In the case just cited, the Court treated of a mere liability—
 a civil liability—to pay an attorney's fee not exceeding ten
 dollars.

In the case at bar, we are discussing the law which makes a
 felon of an innocent dealer in metals, who has committed no
 immoral act, but has merely failed to use diligent effort to as-
 certain a legal right and solve a legal question.

We claim that this statute is not "reasonably necessary for
 "the accomplishment of the purpose" and is "unduly
 "oppressive upon individuals; the legislature may not,
 "under the guise of protecting the public interests, ar-
 "bitrarily interfere with private business or impose un-
 "usual and unnecessary restrictions upon lawful occu-
 "pations.

"Thus, an Act requiring a master of a vessel arriving
 "from a foreign port, to give the name, birthplace, and
 "occupation of every passenger so reported; * * *
 "So held, by this Court to be indefensible and as an
 "exercise of the Police Power, and to be void as inter-

“fering with the right of Congress to regulate Commerce with foreign nations.”

In *Josma vs. Western Steel Car and Foundry Co.*, 94 N. E. 945, 249 Ill. 508; the Court pronounced unconstitutional a statute, which made it a crime for an employer to engage workmen to journey from one place to another by means of false representations;

“This statute imposes upon the employers of workmen coming from another place to their place of employment a different measure of liability, both civil and criminal for their wrongful acts from that imposed upon other persons. It is therefore invalid unless circumstances exist making its enactment essential to the public health, morals, safety, or welfare. *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; *Harding v. People*, 160 Ill. 459, 43 N. E. 624, 32 L. R. A. 445, 52 Am. St. Rep. 344; *Starne v. People*, 222 Ill. 189, 78 N. E. 61, 113 Am. St. Rep. 389; *Off & Co. v. Morehead*, 235 Ill. 40, 85 N. E. 264, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184.”

“The legislature may in the exercise of the police power classify persons if the classification is based upon some reasonable distinction having reference to the object of the legislation, but there can be no discrimination in legislation unless there is an actual difference of condition. The class to whom this act applies is workmen changing from one place to another. The representations aimed at are those which concern the kind and character of the work, of the compensation, the sanitary and other conditions of the employment and the existence of a strike or other labor trouble. These conditions or some of them are as important to the stenographers in an office, the clerks in a store or bank, the teachers in a school, or any of the professional or semiprofessional people who are employed by others, as to the workmen mentioned in the act. They are as important to the workman who does not leave his home for employment as to him who does.

“If persons entering into contracts of employment may be placed upon a different footing from persons

"entering into other contracts in the manner provided
 "in this act, it can be only by an act sufficiently compre-
 "hensive to include all persons subject to the evil aimed
 "at—the deception of employees as to the terms, char-
 "acter, and conditions of their employment. A strike
 "might exist among the telegraphers of a city, but the
 "employer would not violate this statute if he employed
 "other telegraphers without notifying them of the
 "strike. A tailor shop might be unsanitary, but the em-
 "ployer would not violate this statute so long as he em-
 "ployed only resident tailors. A statute cannot be sus-
 "tained which applies to some cases and does not apply
 "to other cases not essentially different in kind. This
 "statute is an arbitrary enactment, not operating equal-
 "ly on all persons under like conditions but special in its
 "operation, and is therefore violative of constitutional
 "rights."

In *City of Chicago vs. Lowenthal* 90 N. E. 287; 242 Ill. 404, the Court construed an ordinance of the City of Chicago, which required the license of "junk shops." The accused was arrested for keeping a junk shop without a license. It appeared that the accused was engaged in the business of buying in car load lots, and from the regular junk shop keepers of the city, in wagon load lots, and did a business of about three-quarters of a million a year.

The Court held that the accused was not the keeper of the junk shop, and the Court held, that if the ordinance did apply to such a business as that carried on by the accused;

"These regulations would be impracticable and are
 "burdensome as to rendering the ordinance void as an
 "unreasonable interference with the business of the
 "wholesale dealer; it is the duty of the Court to so con-
 "strue an ordinance when it is susceptible of two con-
 "structions, as to sustain the ordinance."

The case at bar involves any dealer in metals, not only junk dealers.

In *Fisher Co. vs. Woods*, 187 N. Y., 90, the Court considered the New York Statute making it a misdemeanor for any person to offer for sale any real property without the written authority of the owner, the Court commented on the fact, that the real estate business was a legitimate business.

The Court made this pertinent statement: "It may

“be that there are dishonest persons engaged in the
“business of real estate agents, but it is equally true
“that dishonest persons are found in every occupation.”

The Court also said:

“If, therefore, the legislature, in the exercise of its
“Police powers, may, by this act, lawfully make it a
“misdemeanor for a person to render services to an
“owner in procuring a purchaser without his written
“authority, it may also provide, that a lawyer should be
“guilty of a misdemeanor for drawing a contract for a
“client, or for rendering him any other service, without
“having authority therefor in writing. It would also be
“competent to place like restrictions upon every em-
“ployee in every trade and occupation. It is difficult to
“see how there could be any limitation to the power of
“the legislature in this direction. To our minds this
“is going too far. It is an arbitrary infringement upon
“the liberty and rights of all persons who choose to en-
“gage in such occupation. Had the act been for the pur-
“pose of regulating the business of brokerage, or a
“statute of frauds, a different question would have been
“presented, but it is neither.”

“It relates, as we have seen, to any and every person,
“and instead of making the oral contract void, it makes
“the person employed guilty of a misdemeanor, and
“punishable as a criminal.

“Undoubtedly, the power of the legislature, to enact
“what shall amount to a crime is exceedingly large, but
“as was said by *Peckham, J.*, in *People vs. Gillson*
“(Supra); ‘That there is a limit even to that power
“under our Constitution we entertain no doubt, and we
“think that limit has been reached and passed in the
“act under review! So we conclude with reference to
“this act.’ ”

The above language is most applicable to the case at bar; to paraphrase the language:

If the Legislature can make it a felony for a dealer in metal to purchase copper without making diligent effort to ascertain the legal right of the seller, it can do the same thing with reference to the purchase of any article by any tradesman, “it would also be competent
“to place like restrictions upon every buyer in every
“trade and occupation. It is difficult to see how there

"could be any limitation to the power of the legislature
"in this direction."

If the Act had required that a dealer in metals, should exercise diligent effort to ascertain the legal right of the seller, and that in case of failure he should be deemed or *presumed* to be guilty of a felony, we should have a different question. Then the dealer in metal would have the burden of the evidence in overcoming the presumption; but in the Act in the case at bar, we have the *guilt established*, and the adjudication made in advance, without reference to anything which the dealer may be able to prove, and without reference to his moral obliquity. The Act is not a regulation of the junk business or of the business of the dealer in metals; that business had already been regulated.

The Act was passed at the instigation of the favored corporations to make it impossible for persons selling to iron and steel mills to deal in copper, lead, iron, solder, or brass.

The fact that the Legislature passed this Statute in a pretended exercise of the Police power, will not save it. As was said in *People vs. Buffalo Fish Co.*, 164 N. Y. 93, in pronouncing unconstitutional a Health law, "The good intentions of the

"legislature will not save a state statute from condemnation when it in fact conflicts with the supreme law
"of the land. * * * *

"It will not do to hold that the Constitution can never
"be violated except when the legislature intends to. It
"is frequently violated with the very best intentions."

In *People vs. Hawkins*, 157 N. Y. 1, the Court pronounced unconstitutional the Statute which compelled convict made goods to be marked as such. The article sold was a scrubbing brush. The Court said: "The scrubbing brush in question was

"beyond all doubt an article of property in which the
"defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the
"criminal law, from buying or selling or having it in his
"possession, except upon the condition that he shall
"attach to it a badge of inferiority which diminishes the
"value and impairs its selling qualities."

What ought the same Court to have said, if the Statute had not merely made the defendant stamp upon the scrubbing brush a description of its origin, but had compelled the defendant, by diligent effort to ascertain the legal right of the seller to sell the brush?

In the same case the Court held: "It would be trifling with
 "the Constitution to attempt to uphold this law on the
 "ground that all producers or vendors of goods may be
 "required to tell the truth concerning them, both as to
 "their quality and the means by which or the place
 "where they were manufactured. *A knowledge of the*
"truth concerning the origin of every article of prop-
"erty which is the subject of sale, trade or commerce
"cannot be essential to the public welfare, and even if
"it was the law could be effective only when applied to
"all property alike and not limited to articles made in
"certain places and by a certain class of workmen."

What should the same Court have said with reference to the law making it a felony not only for a dealer who failed to ascertain that the property belonged to a particular corporation, but also for a dealer who failed to ascertain the legal right of his immediate vendor to sell the property.

As was said in *People ex. rel. Phillipps vs. Ragues* 136 *A. D.* 417, "The act now before us does not classify by arranging according to quality, but by *arranging according to accident.*"

This plaintiff in error has a constitutional right to make any contract (not properly prohibited by some rule or Statute other than the one which we are discussing) without, by diligent inquiry, ascertaining the solution of a legal question.

As was said in *People vs. Beattie*, 96 *A. D.*, 383, "A law is of
 "doubtful validity which creates the same condition in
 "particular parts of the State, but only punishes its
 "violation in two.

"All laws must operate equally, and where it is apparent, and no reason can be assigned, for making the
 "act a crime in one place and giving the persons immunity for its violation in another, it operates unequally, and is, therefore, invalid."

Substitute in the foregoing, the element of a distinction in persons, in the place of a distinction in locality, and you have the case at bar.

The business of a dealer in metals should, unquestionably, be regulated; and, if the regulation is not observed, the neglect may well constitute a crime; but, if the public welfare demands that a dealer in metals before he buys shall make diligent inquiry to ascertain the legal right of the vendor to sell a coal scuttle, or a brass cuspidor, or copper wire; then the danger to

be guarded against is a *danger inherent in the sale of this species of property*, and all persons similarly situated, as possible or probable purchasers, and who are about to purchase, should be placed under the performance of the same duty.

If A, who is not a dealer in metal, bought a horseshoe belonging to a telephone company, he is innocent. If B, who is such a dealer, buys it of A, he is guilty of a felony even though he acted with absolute innocence of purpose. A dealer in metal would be guilty if he bought copper wire in a hardware store if it ever turned out that the wire belonged to a telephone Company, unless he asked to see the original invoices.

3. The statute is solicitous concerning the property of only railroad, telephone, gas and electric companies, and is class legislation based upon illogical and arbitrary distinctions.

The Statute pretends to protect property consisting of wire, cable, copper, lead, solder, iron or brass. It may be *new or old wire, new or old cable*, etc., etc. The iron may be *new or old iron, pig or wrought iron*; it may be rails or nuts, or bolts, or anything imaginable in any one of a half a million categories.

A blast furnace may have thousands of dollars worth of pig iron lying in its yards. Why should a furnace be discriminated against if the law is necessary to the public welfare. A blast furnace may have a car of pig iron in transit on a railroad. The pig iron does not belong to the railroad; it belongs to the blast furnace, or to the purchaser, a steel mill. Why should the steel mill or the blast furnace be discriminated against when its pig iron is forty miles from the nearest cross road on a siding?

Why should not the Stromberg Carlson Company (a manufacturer of telephone equipment, but not a telephone Company) be protected as to the wire and cable which it owns and has exposed in all parts of the country?

Why should not the Niagara Falls Power Co. be protected as to its wire and equipment, which consists, in part, of thousands of miles of copper wire throughout New York, and Ohio and Pennsylvania.

Why should a brass foundry be discriminated against as to the brass which it has in transit for delivery to the Western Electric Co.

Why should not a plumber be protected as to the plumbing in a building being erected,—lead, solder, and iron, and which is left exposed to the theft of anyone criminally inclined? The City of New York and the City of Rochester have thousands upon thousands of dollars in money invested in copper wire, cable, and other metals, and which go into their Police alarm, and Fire alarm systems. There are many independent police and burglar alarm companies, which have similar investments.

What about the copper that belongs to the concerns which make architectural ornamentations?

What about the jobbers of wrought iron and pig iron of all kinds? or the hardware dealer with his bolts and nuts, and sheet and bar iron, of every particular? Why not the blacksmith with his horseshoes? Why not the stove foundry? In short why should a railroad or a telephone company have its iron so sacred, and all the hundreds and thousands of other industries be without protection, if this statute is intended to protect the public? *The character of the articles involved is the same in all cases; in all cases the same alleged liability and temptation to thieves.*

Can it be truthfully said with reference to any of the property which we have referred to, that "it is usually of such shape and form as to indicate at a glance use and ownership of the kind specified?"

It is "manifest" that it is not the object and "purposes" of the law to do anything except to protect railroad companies and telephone companies, etc. Is not the law unconstitutional under the reasoning of the *Jacobs case*, (supra)?

Does not the class to which the dealer in metals belongs comprise as "small a number of the community at large" as "merchants?"

And is not this law just as much class legislation as the Statute which was erased by the decision in *Wright vs. Hart*, (supra)?

Is not this legislation as offensive as that which was declared unconstitutional in *Shaver vs. Pennsylvania Co.* 71 Fed. 931, where it was held that a law might not forbid railroads and insurance companies from agreeing with employees to waive their right to damages from personal injury, in so far as the holding found the vice to be that the law was class Legislation and infringed the right to contract?

Within the language of *Lochner vs. N. Y.* 198 U. S. 45, 56;

49 *Law. Ed.* 937, 941, the Statute is "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty."

As was said in the same case, at page 64, "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the Police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."

The motive for passing the Statute in the case at bar was *not to protect all persons similarly situated*, owning the property described, but it was to protect only the specific corporations named without regard to the welfare of the other owners of the same character of property.

In *Cotting vs. Godard*, 183 U. S. 79, 109; 46 *Law. Ed.* 92, 109, this Court declared that a Statute which imposed certain regulations upon corporations employing ten or more laborers, and left corporations employing less than that number free from such regulations, was unconstitutional, because of such a discrimination. The same reasoning applies to the case at bar; because the Statute discriminates against all except the preferred class.

The logical, the reasonable distinction is the distinction based upon the character of the property, and all who own such property are similarly situated. It is an arbitrary distinction which protects a railroad corporation running a *ten mile* railroad between two points, and a barge canal contractor who may be running a *twenty mile* railroad, with his railroad equipment more exposed and more in disorder. It is an arbitrary distinction which protects a railroad carrying pig iron belonging to it, and makes the purchaser of such pig iron guilty of a felony if he does not make diligent inquiry to ascertain the legal right of the seller; and which fails to protect a steel mill owning the pig iron under identical circumstances, and makes the purchaser of such pig iron under the same circumstances absolutely innocent, morally and legally.

As was said in the *Cotting case*, (*supra*) this "is an unjust discrimination and a denial of the equal protection of the laws."

In *Connolly vs. Union Sewer Pipe Co.* 184 U. S. 540; 46 *Law. Ed.* 679, this court declared a statute of Illinois unconstitutional, which declared certain combinations illegal except when composed of those dealing in Agricultural products and

live stock. This court said that because the things otherwise prohibited could be done by agriculturalists or live stock raisers, the Statute was unconstitutional within the prohibition of the Constitution forbidding states to deny to persons the equal protection of the laws.

This Court held that the Statute could not be sustained as an exercise of the Police powers of the State, and this court said at page 558, "No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

"The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

"But upon this general question we have said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

At page 560, the Court said: "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

"But arbitrary selection can never be justified by calling it classification."

In *Gulf, C. & S. F. R. Co. vs. Ellis*, 165 U. S. 150; 41 Law. Ed. 666, this Court said with reference to compelling a railroad to pay an attorney's fee when defeated, "But before a distinc-

"tion can be made between debtors, and one be punished
 "for a failure to pay his debts, while another is per-
 "mitted to become in like manner delinquent without
 "any punishment, there must be some difference in the
 "obligation to pay, some reason why the duty of pay-
 "ment is more imperative in the one instance than in
 "the other. * * * * Indeed, the statute arbi-
 "trarily singles out one class of debtors and punishes it
 "for a failure to perform certain duties—duties which
 "are equally obligatory upon all debtors; a punishment
 "not visited by reason of the failure to comply with any
 "proper police regulations, or for the protection of the
 "laboring classes, or to prevent litigation about trifling
 "matters, or in consequence of any special corporate
 "privileges bestowed by the state. Unless the legisla-
 "ture may arbitrarily select one corporation or one
 "class of corporations, one individual or one class of
 "individuals, and visit a penalty upon them which is not
 "imposed upon others guilty of like delinquency, this
 "statute cannot be sustained."

In the case at bar, it is certainly true that it is the character of the property and the exposure of the property to theft, which is the only possible reason which can be ascribed for the necessity of the law.

Why, then, *if this be the logical and true distinction, should not all persons about to purchase such property become liable to the same penalty for not making a diligent inquiry to ascertain the legal right of the vender to sell?*

In *People vs. Hawkins*, 157 N. Y., 1, the Court of Appeals considered the law requiring convict made goods to be labeled, and this language at page 9 is significant:

"*A knowledge of the truth concerning the origin of every article of property which is the subject of sale, trade or commerce cannot be essential to the public welfare, and even if it was the law could be effective only when applied to all property alike and not limited to articles made in certain places and by a certain class of workmen.*"

We cite further from the same opinion, not because the case is on all fours, but because its fundamental logic is applicable to the case at bar. The Court says further:

"If the police power extends to the protection of certain workmen in their wages against the competition

“of other workmen in penal institutions, why not extend it to other forms of competition? Why not give the workman who has a large family to support some advantage over the one who has no family at all? Why not give to the old and feeble a helping hand by legislation against the competition of the young and the strong? Why not give to the women, the weaker sex, who are often the victims of improvidence and want, a preference by statute over the man? Why confine such legislation to scrubbing brushes and like articles made in prisons, when multitudes of men engaged in farming, mercantile pursuits and almost every vocation in life are struggling against competition?

“If the statute now under consideration is a valid exercise of the police power, I am unable to give any reason why the legislature may not interfere in all the cases I have mentioned to help those who need help at the expense of those who do not.”

Within the language of the foregoing case, let us say: *That the accident of who owned the property can have no bearing upon the guilt or innocence of the purchaser. If the property is of such a nature that it is peculiarly susceptible to theft, it is the nature of the property and not owner of it which constitutes the fundamental and logical distinction.*

If railroads can receive such protection as in the Statute here involved, they can with equal logic be compelled to pay a ten dollar attorney's fee in case of defeat. An equally reasonable statute can make it a *felony* to steal from such a railroad a five cent cake of soap, when the same theft from another would constitute a *misdemeanor* and *petit larceny*.

And within the language of the last case cited, why would it not be equally justifiable to make it a felony to buy a newspaper without ascertaining the legal right of the newsboy to sell it; because, forsooth, newspaper companies distribute their property by throwing it off the cars in out of the way places while a train is in motion, and under such circumstances the property may readily be stolen.

In *People ex. rel. Phillipps vs. Raynes*, 136 A. D., 417, 425, the Court used this significant language, “The act now before

“us does not classify by arranging according to quality,

“but by arranging according to accident. * * *

“A classification by origin, applied to a vast variety of

“goods, seems to be more unreasonable than any enumerated by the Court of Appeals.”

This case was affirmed by the Court of Appeals and concerned the requirement of a license for selling convict made goods.

In *People vs. Marcus*, 110 A. D., 255, the Court pronounced unconstitutional the Statute which prohibited a person from making a contract with his employee not to join a labor union. The Court held that the statute discriminated in favor of labor unions, and the same reasoning would pronounce the statute under consideration to be void, because discriminating in favor of the corporations named.

In *People ex. rel Appel vs. Zimmerman*, 102 A. D., 103, the Court pronounced unconstitutional a trading stamp law. The law provided that no one could give trading stamps except such as were issued by a merchant or manufacturer, with his own goods, and were redeemed by him. The Court said:

“By subdivision 5, as already noted, the business of dealing in trading stamps is reserved for the merchant or manufacturer. This creates a preferential class.”

We wish to paraphrase a quotation from *People vs. Beattie*, 96 A. D. 383, 392:

“A law is of doubtful validity which creates the same condition in particular parts of the state, but only punishes its violation in two. All laws must operate equally, and where it is apparent, and no reason can be assigned, for making the act a crime in one place and giving the persons immunity for its violation in another, it operates unequally, and is, therefore, invalid.”

A law is of doubtful validity which takes identically the same conditions with reference to the purchase of property, but only punishes an act when performed by one class, and then only with reference to property belonging to certain specified owners. All laws must operate equally and where it is apparent, and no reason can be assigned for making the Act a crime when such property is owned by a specified corporation, and giving the persons immunity when owned by some other corporation, it operates unequally, and is, therefore, invalid.

In matter of *Van Horne*, 70 *Atl.* 986; the Court pronounced unconstitutional a statute of New Jersey which made it a misdemeanor for the manager of a theatre to admit children under 16 years old unaccompanied by a parent, etc., but it provided that the law should not apply to entertainments held upon piers devoted to public entertainments.

The Court said: "A statute, to escape condemnation as infringing the rights guaranteed by this amendment, must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity; otherwise, there would be unjust discrimination, which this constitutional mandate prohibits."

"Wherever an enactment has attempted to make that a crime in one place which by all laws of reason must be a crime elsewhere within the same jurisdiction, such attempted distinction is found by the courts to be illusory, and the act is held unconstitutional."

4. The statute required the plaintiff in error to determine a legal question which was not a question as to whether the property had been stolen, but the question as to the legal right of the seller to sell it.

We argued in the Courts of New York that the statute did not necessitate the property to be stolen in order to convict the buyer, but the Court of Appeals has held that it is necessary that the property be stolen.

The Court of Appeals have, nevertheless, laid down the proposition that a dealer must exercise diligent effort not to ascertain whether the property has been stolen, but to ascertain whether the seller had a legal right to sell it.

As the Court of Appeals said: "The legislature obviously intended to afford the special protection needed by owners of this kind of property by placing those dealing in it, when second-hand, under the risk of buying at their peril unless they make diligent inquiry to ascertain whether those offering it for sale had the legal right to sell it."

The statute itself says, that the dealer is guilty if he buys, "without ascertaining by diligent inquiry that the person selling or delivering the same has a legal right to do so."

According to the opinion of the Court of Appeals, and according to the expressed words of the statute, the dealer's in-

quiry is directed to the question of the legal right of the seller to sell, and not to the question of an original larceny.

The question as to what might constitute a legal right to sell is a question which sometimes perplexes our Courts of last resort.

Take an illustration; suppose the American Wire Company sells some copper wire to the Rochester Railway Company. Subsequently, the vendor, alleging fraud maintains a replevin action; the Court of Appeals by a vote of four to three decide that title passed and that the Railway Co. were the owners of the wire. A dealer who was involved in buying that wire, or part of it, would rather such a situation be guilty of a felony if he did not make diligent inquiry. If the Court of Appeals had decided, by a vote of four to three, that title had not passed the dealer would have been a perfectly innocent man and would have violated no criminal statute.

Under this statute a dealer could buy the remains of a machine shop belonging to the American Locomotive Works, which had been subjected to a fire, without making diligent inquiry as to the legal right of the seller and be innocent; but, if the same identical property, under the same identical circumstances, was purchased by the dealer, but had happened to come from one of the machine shops of the New York Central lines, the dealer would be guilty of a felony.

As was said in *Lawton vs. Steel*, 119 N. Y., 226:

“The legislature may not declare that to be a crime
“which in its nature is and must be under all circum-
“stances innocent, nor can it in defining crimes or in
“declaring their punishment take away or empower any
“inalienable right secured by the Constitution.”

In the case at bar, the act must always be innocent in its nature, because the guilty act involving moral turpitude has already been taken care of by the rest of the Statute.

In *Cotting vs. Godard*, 183 U. S. 79; 46 Law. Ed., 92, this Court said with reference to the circumstance of having the law apply to those employers who employ ten or more workmen:

“The criminality or innocence of an act done ought
“not to depend upon the happening of such a circum-
“stance.”

In *U. S. vs. Reese*; 92 U. S. 214; 23 Law. Ed. 563, this Court said: “Every man should be able to know with certainty when
“he is committing a crime.”

* * * * *

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step aside and say who could be rightfully detained and who should be set at large.”

Within the foregoing language, this plaintiff in error could never know when the duty was laid upon him and when it was not; he could never tell when his failure to make diligent inquiry constituted a felony, and when it did not. It will not do to answer this point by saying that he can save himself by making diligent effort in all cases. The statute imposes upon him no such burden.

In *Gulf Colorado and Santa Fe Railway Co. vs. Ellis*, 165 U. S. 150, the Court said with reference to the ten dollar attorneys' fee in case of defeat:

“No individuals are thus punished and no other corporations. The Act singles out a certain class of debtors and punishes them when in like delinquency it punishes no others. They are not treated like other debtors or equally with other debtors.”

This language is applicable to the case at bar. The plaintiff in error is not punished for an immoral act. He is punished because, after complying with all the regulations of a much regulated business, he fails to make diligent inquiry to ascertain a legal right.

In an isolated situation where the party happens to be a dealer in metals, where the property (without any hall marks to indicate its origin) belonged to a selected class of corporations, and where he failed to make what is subsequently defined by some Judge or Court to be diligent effort to ascertain something which Courts might quarrel about—a legal right—a felony is adjudicated by statute to have been committed by a man who did not know he did anything blameworthy.

It is beyond the power of any Legislature to make a crime depend upon such arbitrary, fortuitous, and utterly inconsequential circumstances.

As was said in the *Connolly case*, “the equal protection of the laws is a pledge of protection of equal laws.”

The discrimination in the *Connolly case*, which exempted agriculturists, extends to the case at bar, except that it extends at both ends; on the one end it discriminates against the dealer in metals, and on the other end it discriminates in favor of four classes of corporations.

There is other language in the Connelly case which applies to the case at bar.

"We conclude this part of the discussion by saying
 "that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals
 "if they violate the regulations prescribed by the state
 "for the purpose of protecting the public against illegal combinations formed to destroy competition and
 "to control prices, and that others of the same class
 "shall not be bound to regard those regulations but may
 "combine their capital, skill or acts to destroy competition and to control prices for their benefit, is so
 "manifestly a denial of the equal protection of the laws
 "that further or extended argument to establish that
 "position would seem to be unnecessary."

It is not far-fetched to use this illustration—The manufacturer of copper wire ships it to a telephone company; the junk dealer buys it; the junk dealer's criminality depends absolutely upon the question as to when the title passed from the manufacturer to the telephone company. Did it pass upon delivery to the common carrier, or did it only pass after the telephone company had exercised its right of inspection, and, therefore, not until after acceptance, or was there a question of stoppage in transitu? The situation is preposterous and absurd.

Let us go back to the old condition, when ANY man could be punished for buying ANY *stolen property*, where he had any reasonable ground to believe that it was stolen. The old statute is broad enough to punish the guilty. The Legislature has no business to spread so large a net and to impose upon the Courts the duty of dividing the guilty from the innocent, not according to whether the act is a guilty act or not, but according to circumstances upon which criminality never did and never can depend—the circumstance of who owned the property.

In *People ex. rel. Rodgers vs. Coler*, 166 N. Y. 1, the Court pronounced unconstitutional a statute which provided, that a public contractor must pay the prevailing rate of wages in a locality, and the Court said, that the statute was unconstitutional because "it virtually confiscates all property rights
 "of the contractor under his contract for breach of his
 "engagement to obey the statute, and it attempts to

"make acts and omissions penal which in themselves
"are innocent and harmless."

As was said in *Board of Commissioners of Excise vs. Merchant*, 103 N. Y., 143, 148, "it would not be possible to uphold
"a law which made an act prima facie evidence of
"crime over which the party charged had no control,
"and with which he had no connection, or which made
"that prima facie evidence of crime which had no relation to the criminal act and no tendency whatever by
"itself to prove a criminal act."

As was said in *People vs. Gillson*, 109 N. Y., 389, 400, where the Court considered the constitutionality of the statute which prohibited the giving of gifts or premiums with any article of food, "it cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of
"the owner or dealer in food products to pursue a legal
"calling in the proper manner, or that it does not to
"some extent, at least, deprive a person of his property by curtailing his power of sale, and unless this
"infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly
"tend in that direction, or to that result the legislation
"is invalid as plainly violative of the Constitutional
"provision under discussion."

In the case at bar, the dealer's power to purchase is restricted by the absurd condition of making him ascertain a legal right, and the legislation is not necessary for the common welfare because if legislation of this character were necessary, it ought to be made to apply to all persons about to purchase such property, and it ought to apply to all the owners of such property without restriction, and it ought to compel an inquiry, not as to a legal right of the seller to sell, but as to whether or not the property had, in fact, been the subject of a larceny.

POINT II.

The Construction Placed Upon This Statute by the Court of Appeals of the State of New York is Clearly Erroneous. And the Situation is such That This Court is Permitted to Interpret the Statute for Itself. Under a Proper Interpretation the Statute is Unconstitutional for Many More Reasons Than Those Argued in POINT I of This Brief.

This Court is not bound by the construction placed upon the Statute by the Court of Appeals.

The statute which we attack has never been construed by any Court until its construction in this case in the Court of Appeals. The Court of Appeals determined that the statute applied only to stolen property; it determined that it applied only to second-hand materials; it determined that, "the sec-

"ond-hand materials are usually of such shape and form

"as to indicate at a glance use and ownership by a cor-

"poration of the kind specified;"

and it determined that the dealer need not ascertain the legal right of the seller, but need only make diligent inquiry to ascertain. In each one of these parts the Court of Appeals committed a manifest error.

We shall argue in another subdivision of this point the consideration to indicate that the Court of Appeals is wrong. It is sufficient for us to say here, that a criminal statute should be clear, and it is apparent from the literal reading of the statute involved, that the interpretation placed upon it by the Court of Appeals is an injection into the statute of circumstances not therein expressed. *The Court of Appeals thought it necessary to judicially amend the statute in an effort to save it.*

When this plaintiff in error pleaded guilty to this statute, he had the absolute right to believe that the statute meant just what it said. Whatever the courts may do in the interpreting of statutes involving civil rights, they are clearly without power to amend a criminal statute by a pretended interpretation. **This plaintiff in error was not guilty of a violation of this statute under the interpretation placed upon it by the Court of Appeals.** This plaintiff was guilty of a violation of this statute under the language of the statute, which, in the parts being considered, are clear and unambiguous. This plaintiff in error pleaded guilty to a violation of one statute, and the Court of Appeals has sustained his conviction under absolutely a different statute. This plaintiff in error has never had his day in Court under the statute which the Court of Appeals has said existed, and the existence of this statute, as amended by the Court of Appeals, was never suspected by this plaintiff in error, and he had no reason to suspect its existence because at the time he pleaded guilty, he knew that the statute to which he pleaded guilty was clear and unambiguous, and beyond the pale of so-called judicial interpretation.

The statute to which the plaintiff in error pleaded guilty is by irresistible inference unconstitutional in the opinion of the Court of Appeals because, in order to save it, they have amended it by judicial construction. In other words, the **plaintiff in error pleaded guilty to an unconstitutional statute**, and his motion in the arrest of judgment should have been granted; *but the Court of Appeals have said that the Statute makes criminal an entirely different act from that which the defendant upon his plea of guilty conceded that he had performed.*

In *U. S. vs. Capital Traction Company*, 34, App. D. C. 592, the Court considered a statute making it a criminal offense for a Street Railway of the District of Columbia to run an insufficient number of cars. It referred to the sixth amendment of the constitution of the United States, which provides that the accused shall "be informed of the nature and cause of the accusation." The Court asked,—“What shall be the guide to the Court or Jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What may be regarded as grounds for acquittal by one Court may be held sufficient to sustain a conviction in another.”

The Court referred to *Louisville & N. R. Company vs. Com.*, 99, Ky. 132, where the Court held that a statute was unconstitutional because indefinite, which required that the rate charged by Railroad Company shall be “just and reasonable.”

The Court also referred to *Czarra vs. Medical Supers.*, 25 App. D. C. 443, in which there was declared unconstitutional a statute which permitted the revocation of a license for “unprofessional or dishonorable conduct.” In the *Czarra* case the Court held that the accused has, within the sixth amendment, the right to “be informed by the law, as well as by the complaint, what acts or conduct are prohibited and made punishable. In the exercise of its power to regulate the conduct of the citizen, within the constitutional limitations and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable precision what acts are intended to be prohibited.”

In a criminal statute, the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise, there would be lack of uniformity in its enforcement. The dividing line between

what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for the violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the Courts upon another. As was said in *United States v. Reese*, 92 U. S. 214, 23, L. Ed. 563: "If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

In *Lochner vs. N. Y.*, 198 U. S., 45; 49 Law. Ed., 937, the Court said many other things at page 64, "the purpose of a statute must be determined from the natural and legal effect of the language employed."

When this defendant pleaded guilty, he had a right to rely upon the principle expressed in *Lewis' Sutherland on Statutory construction*, 2d Ed. Vol. 1, pg. 176, to the effect that, "the law is to be tested not by what has been done under it, but what may be done under it."

In *Vick Wo vs. Hopkins*, 118 U. S. 355; 30 Law. Ed. 220, this Court refused to accept the interpretation of the Courts of California of the ordinances of the Supervisors of the County and City of San Francisco, and said, "for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances which for that purpose, we are required to ascertain and adjudge.

"We are consequently constrained at the outset to

“differ from the Supreme Court of California, upon the
“real meaning of the ordinances in question.”

As was said in *Baldwin vs. Frank*, 120 U. S., 680; 30 *Law Ed.* 766, with reference to the interpretation of a penal statute:

“The question then to be determined is whether we
“can introduce words of imitation into a penal statute
“so as to make it specific, when, as expressed, it is
“general only.

“This was answered in the negative, the Court re-
“marking: ‘to limit this statute in the manner now
“asked for would be to make a new law, not to en-
“force an old one.’”

In *Burgess vs. Seligman*, 107 U. S. 21; 27 *Law Ed.* 359, the Court refused to accept the interpretation of the Missouri Courts concerning the statute of that State and said, “we do
“not consider ourselves bound to follow the decision of
“the State Court in this case. When the transactions
“in controversy occurred, and when the case was under
“the consideration of the Circuit Court, no construc-
“tion of the statute had been given by the state tri-
“bunals contrary to that given by the Circuit Court.”

This case arose in the Federal Court, and this Court made a statement to the effect, that the Federal Courts had independent jurisdiction in the administration of State laws. The Court also said: “such established rules are always regarded
“by the Federal Courts, no less than by the State
“Courts, themselves, as authoritative declarations of
“what the law is. But where the law has not been thus
“settled, it is the right and duty of the Federal Courts
“to exercise their own judgment, as they also always do,
“in reference to the doctrines of commercial law and
“general jurisprudence. So, when contracts and trans-
“actions have been entered into and rights have ac-
“crued thereon, under a particular state of the de-
“cisions, or when there has been no decision of the
“State tribunals, the Federal Courts properly claim
“the right to adopt their own interpretation of the law
“applicable to the case, although a different interpre-
“tation may be adopted by the State Courts after such
“rights have accrued.”

The constitutional rights of the plaintiff in error either were or were not violated at the time he was sentenced

upon his plea of guilty, and when his motion in arrest of judgment was denied. At that time there was no State decision interpreting this statute. When he was sentenced, there was a situation equally dignified with the situation described, "when contracts and transactions have been entered into and rights have accrued thereon;"

and the defendant had the right to rely upon the literal wording of the statute and was not obligated to anticipate an amendment by the Court of Appeals. Under such circumstances within the Burgess case (*supra*) this Court will construe the statute in order to protect the rights of the plaintiff in error which accrued prior to the time when the Court of Appeals announced its decision.

In *Douglas vs. Pike Co.*, 101, U. S. 679; 25 Law. Ed. 968, this Court said, with reference to being compelled to follow later State decisions, "to the extent of destroying rights which

"have become vested under those given before, * * *

"but where different constructions have been given to
 "the same statute at different times, we have never
 "felt ourselves bound to follow the latest decisions, if
 "thereby contract rights which have accrued under
 "earlier rulings will be injuriously affected."

Surely if this Court will not follow later decisions because desirous of protecting contractual rights vested under earlier decisions, it will not follow a later decision and refuse to protect the liberty and the constitutional rights of the plaintiff in error where his right to liberty depended upon a transaction taking place prior to this decision, and where the statute was so clear that its interpretation from its literal meaning by a defendant amounted to an earlier decision. It is not susceptible to contradiction that a criminal statute must be so clear as to be capable of being understood by the persons coming within its scope and operation.

This statute left no room for construction as was said in *U. S. vs. Reese*, 92 U. S. 215; 23 Law. Ed. 563, the language is plain: "There is no room for construction unless it be as to

"the effect of the Constitution. The question then to
 "be determined is whether we can introduce words of
 "limitation into a penal statute so as to make it specific
 "when, as expressed, it is general only."

"to limit this statute in the manner now asked for

"would be to make a new law, not to enforce an old one.

"This is no part of our duty."

In *Piqua Branch of the State Bank of Ohio vs. Knoop*, 16 Howard 369; 14 Law. Ed., 977; there was under consideration an act of the Ohio Legislature, this Court said, "the rule ob-

"served by this Court to follow the construction of the
"statute of the state by its Supreme Court is strongly
"urged. This is done when we are required to ad-
"minister the laws of the State.

"The established construction of the statute of the
"State is received as a part of the Statute. But we
"are called in the case before us not to carry into effect
"a law of the state, but to test the validity of such a
"law by the Constitution of the Union. We are exer-
"cising an apparent jurisdiction.

"The decision of the Supreme Court of the State is
"before us for revision, and if their construction of the
"contract in question impairs its obligation, we are
"required to reverse their judgment.

"And whilst we have all the respect for the learning
"and the ability which the opinions of the Judges of
"the Supreme Court of the state command, we are
"called upon to exercise our own judgment in the case."

In *Atchison, Topeka, Santa Fe R. R. Co. vs. Matthews*, 174 U. S. 96; 43 Law. Ed. 909, the Court in introducing a criticism of its argument said: "It may be suggested that this line of

"argument leads to the conclusion that a statute of one
"state whose purpose is declared by its Supreme Court
"to be a matter of Police regulation, will be upheld
"by this Court as not in conflict with the Federal Con-
"stitution, while a statute of another state, similar in
"its terms, will be adjudged in conflict with that Con-
"stitution if the Supreme Court of that state interprets
"its purpose and scope as entirely outside police regu-
"lation. But this by no means follows; this Court is
"not concluded by the opinion of the Supreme Court
"of the State."

Vick Wa vs. Hopkins, 118 U. S. 356, 366 (30; 220, 225):

"It forms its own independent judgment as to the
"scope and purpose of a statute, while, of course, lean-
"ing to any interpretation which has been placed upon
"it by the highest Court of the State."

See also *Louisville Trust Co. vs. City of Cincinnati*, 76 Fed. 296 (C. C. A. 6th Cir.); *Loeb vs. Trustee of Columbia, etc.*, 91 Fed. 37.

The Court of Appeals is wrong when it says, that the statute should be interpreted as relating only to stolen property; as dealing only with second-hand materials; as dealing with "property whose use and ownership can be indicated at a glance;" and as requiring the dealer only to make diligent effort instead of actually ascertaining a legal right; because

(a) The property need not have been stolen.

Turn to Section 550 of the Penal Code. The Section begins "a person who buys or receives 'any stolen property,'" etc. But when it comes to the junk dealer, the Section says that anyone who, being a junk dealer, etc., "buys or receives any 'wire, cable,'" etc., belonging to a "railroad," etc., "without 'ascertaining,'" etc., etc. *Not one word about stolen property!* It doesn't mention *stolen* wire or cable, nor "*such*" property and then by reference to the beginning of the section make "*such* property" "*stolen*" property. It is absolutely without qualification. The "property" doesn't have to be "*stolen*" property at all.

The Court of Appeals has said that the Legislature *meant* to say that the property should be stolen before the statute applied. Such reasoning will not do concerning a criminal statute. *A defendant who pleads guilty to a violation of the statute prior to its interpretation by the Courts, has a right to rely upon the wording of the statute; he need not assume or imagine that the Legislature meant to say something different than it actually did say.*

A criminal statute should be clear in its language, and where its language is clear, the defendant has a right to rely upon that language, and need not search around through a wilderness of rules as to the interpretation of Statutes. He has the right to believe that the statute means what it says.

(b) The materials need not have been second-hand.

The statute reads, "or who being a dealer in, or collector 'of junk, metals, or second-hand materials,'" etc.

The indictment in this case does not even allege, that the copper wire involved was second-hand. The statute says, being a dealer in (or collector of) "junk, metals, or second-hand materials." The disjunctive "or" is used. The second-hand materials are only one class; the *metals* referred to may

be new or old. The property involved in the indictment is not alleged to have been second-hand. Clearly, in this particular, the interpretation of the Court of Appeals is manifestly erroneous.

(c) The property described in the statute is not of such a shape and form as to indicate at a glance its use or ownership by the corporations referred to.

We have fully covered this in our *Point 1*.

(d) The statute does not require diligent effort only. It requires an actual ascertainment.

The statute says, that the person is guilty who purchases the property, "without ascertaining by diligent inquiry that
"the person selling or delivering the same has a legal
"right to do so."

If a criminal statute should be clear, and if language is to mean anything, this statute provides for an *ascertainment*, and not for an attempt to ascertain.

Certainly, if the purpose of the statute was what the Court of Appeals says it was, the expression of such a purpose is the easiest thing imaginable. The statute should then have read, "without making diligent inquiry to ascertain."

The Court of Appeals is wrong when it says the statute only requires good faith. Good faith may exist side by side with guilt. All the guilty were taken care of by the prior act. *The Court of Appeals in this case has simply said that the statute ought not to mean what it clearly means, and the Court of Appeals has passed another statute, or amended the one which was in existence when the defendant pleaded guilty.* Surely the defendant had the right to believe that the Legislature of the Empire State knew something about the use of words; and, surely, if anyone in the world is to be taken as meaning what he says, it is the Legislature of one of the States of the Union. Yet, after we have pleaded guilty to a failure to ascertain, the Court of Appeals says, that we have pleaded guilty only to a failure to make diligent effort. We certainly knew the thing to which we pleaded guilty, and the statute certainly plainly described the transaction. Yet our conviction has been affirmed by the Court of Appeals, and we are precluded from combating our alleged guilt under a statute which never existed until two years after we pleaded guilty to an Act, which occurred months before we were indicted.

The situation is grotesque and absurd and shocks the con-

science of any person of the smallest measure of intelligence capable of understanding a simple English phrase—so manifestly unequivocal as to be beyond the pale of judicial construction.

POINT III.

The Judgments Under Review Should be Reversed.

Respectfully submitted,

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FILED.

OCT 18 1912

JAMES H. McKENNEY,
CLERK.

No. 28.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911

BENJAMIN ROSENTHAL, PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

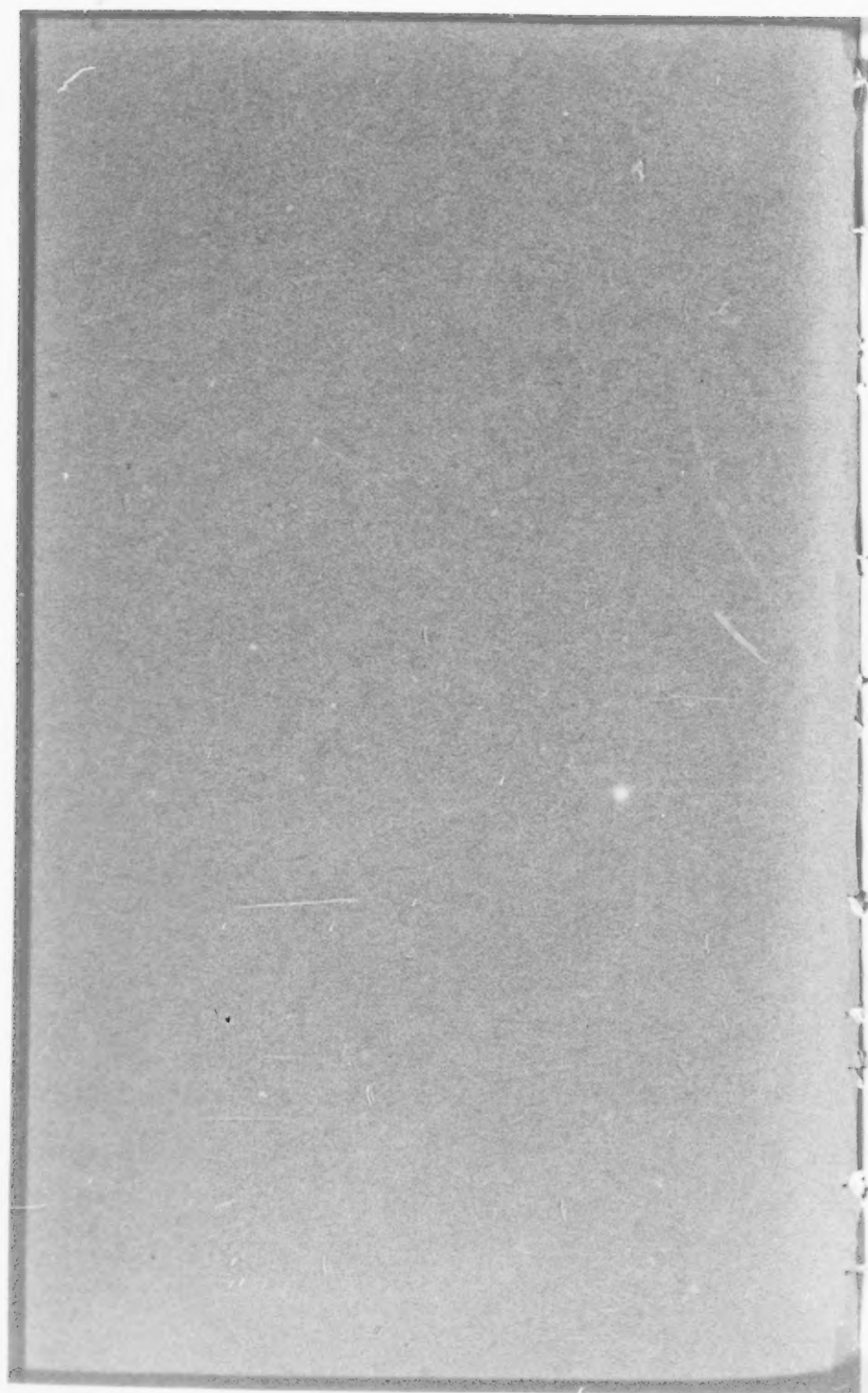
BRIEF OF DEFENDANT IN ERROR

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Rochester, New York.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911

No. 246

BENJAMIN ROSENTHAL, PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR

Statement of the Case

The statement of the case and specification of the errors relied upon are correctly set forth in the brief of the plaintiff in error.

The statute involved is now substantially re-enacted in Section 1308 of the Penal Law of the State of New York.

THE ARGUMENT.

POINT I

The statute under consideration is not unconstitutional, as interpreted by the Court of Appeals of the State of New York.

The Court of Appeals, in its opinion, gives, in a very few words, the reasons which led to the passage of the statute under consideration. Notwithstanding previous efforts of the Legislature of the State to prevent the receipt of stolen property by dealers in junk and metals, knowing, or having reason to know, it had been stolen, such crimes became of

alarming frequency, and it was found absolutely necessary to pass some stringent statute governing and controlling the operations of such dealers. This was within the police power of the State, which enables the Legislature to prohibit all things hurtful to the comfort, safety and welfare of society, and to adopt such legislation as will promote the same.

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws', undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone *except as applied to the same pursuits by others under like circumstances*; that no greater burdens should be laid upon one than are laid upon others *in the same calling and condition*, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. * * * * Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint, *if they operate alike upon all persons and property under the same circumstances and conditions*. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carry-

ing out a public purpose, is limited in its application, *if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.*"

Barbier vs. Connolly, 113 U. S. 27.

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, *under like circumstances and conditions*, both in the privileges conferred and in the liabilities imposed."

Hayes vs. Missouri, 120 U. S. 68.

In the case of Holden vs. Hardy, 169 U. S. 366, the court, in discussing changes and reforms in the law, said:

"They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

It is well known to those who have made any study of the conditions that one of the greatest evils with which those interested in the administration of the criminal law have to deal, is that growing out of the receipt of stolen property by persons who know, or have reason to believe, that the same has been stolen. It is also well known that the class of persons most directly responsible for the growth of this evil is made up of dealers in materials, such as are described in the statute under discussion. The previous statute relative to the criminal receipt of stolen property had been found wholly inadequate to reach and punish those engaged in such lines of business who made a practice, under the cover

of pretended legitimate business dealings, of receiving such property from those who had wrongfully come into possession of it.

It is also well known that companies or corporations of the kinds mentioned in such statute were the ones most in need of the protection afforded by it, because of the nature and extent of their business and the extreme difficulty involved in attempting to prevent the theft of such property.

With all this in view, the Legislature passed the statute in question, making it apply not only to dealers in, or collectors of, junk and secondhand materials, but also to dealers in, and collectors of, metals of all kinds, used by, or belonging to, such companies.

The argument of the plaintiff in error—that the statute is unconstitutional because it does not discriminate between dealers, but is applicable to all dealers in metals—is far-fetched indeed when such discrimination would undoubtedly have been urged as an argument against the constitutionality of such statute if it had been contained therein.

There is nothing impossible, or even burdensome, imposed by the terms of the statute upon such dealers. It would be absurd to say that the duty to "diligently inquire," imposed by such statute, as interpreted by the Court of Appeals, would require such a dealer to do more than to make inquiry of the representatives of such companies within his own business district, because, as the Court of Appeals has said, all that the law requires "is good faith and honest inquiry."

The whole statute, both the old part and the amendment, must be read together in order to arrive at the intent of the Legislature in passing the amendment, and when so read together the interpretation put upon it by the Court of Appeals is the only reasonable construction that could be given to it.

In view of the statement in the brief of the plaintiff in error—that he is the proprietor of a large wholesale business, and not a peddler—it may be not inappropriate to call the attention of the court to the construction placed by the plaintiff in error upon his occupation in the statement made

to the court at the time that sentence was imposed upon him. In reply to the question as to his occupation, he stated that he was "a junk peddler." (Fol. 31, page 17)

POINT II

The construction placed upon this statute by the Court of Appeals of the State of New York is conclusive.

The plaintiff in error makes much of the fact that the statute in question had never been construed by any court until its interpretation by the Court of Appeals in this case.

It seems to be well settled that the construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text of the statute.

Morley vs. Lake Shore Railway Company, 146 U. S. 162.

It seems to make no difference that the construction which binds this court has been alone given in the very case under consideration.

In the case of Nobles vs. Georgia, 168 U. S. 398, this court followed the construction given by the Supreme Court of the State of Georgia, in that case, to the statutes of that state which were there called in question.

See also Bergemann vs. Backer, 157 U. S. 655.

It is therefore respectfully urged that, reading the whole statute together, it is clearly apparent that the Court of Appeals did not err in its construction of it, and that even if this court might differ with the Court of Appeals in the interpretation to be placed upon such statute, nevertheless it is concluded by such construction.

POINT III

The judgments under review should be affirmed.

Respectfully submitted,

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